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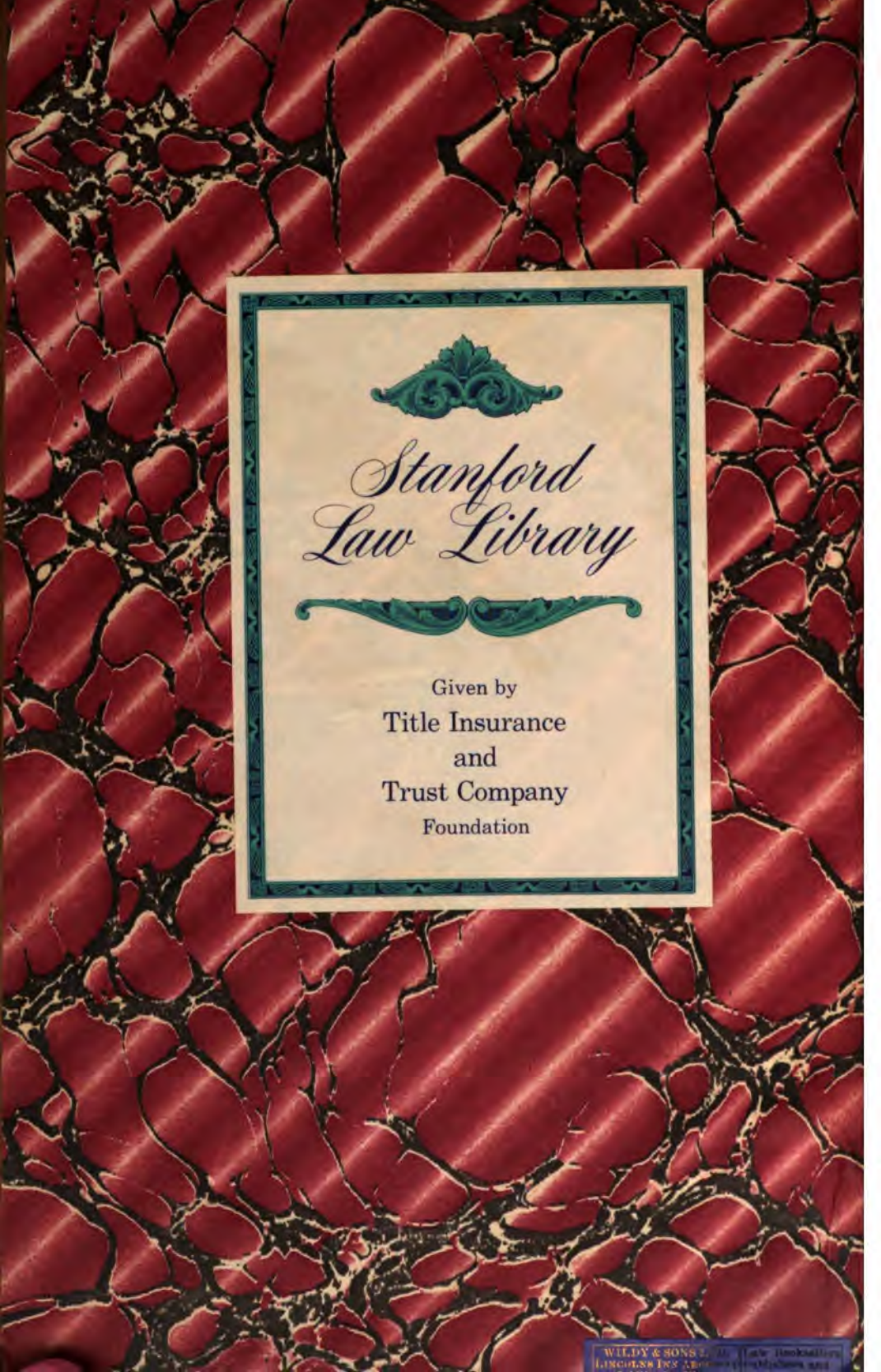
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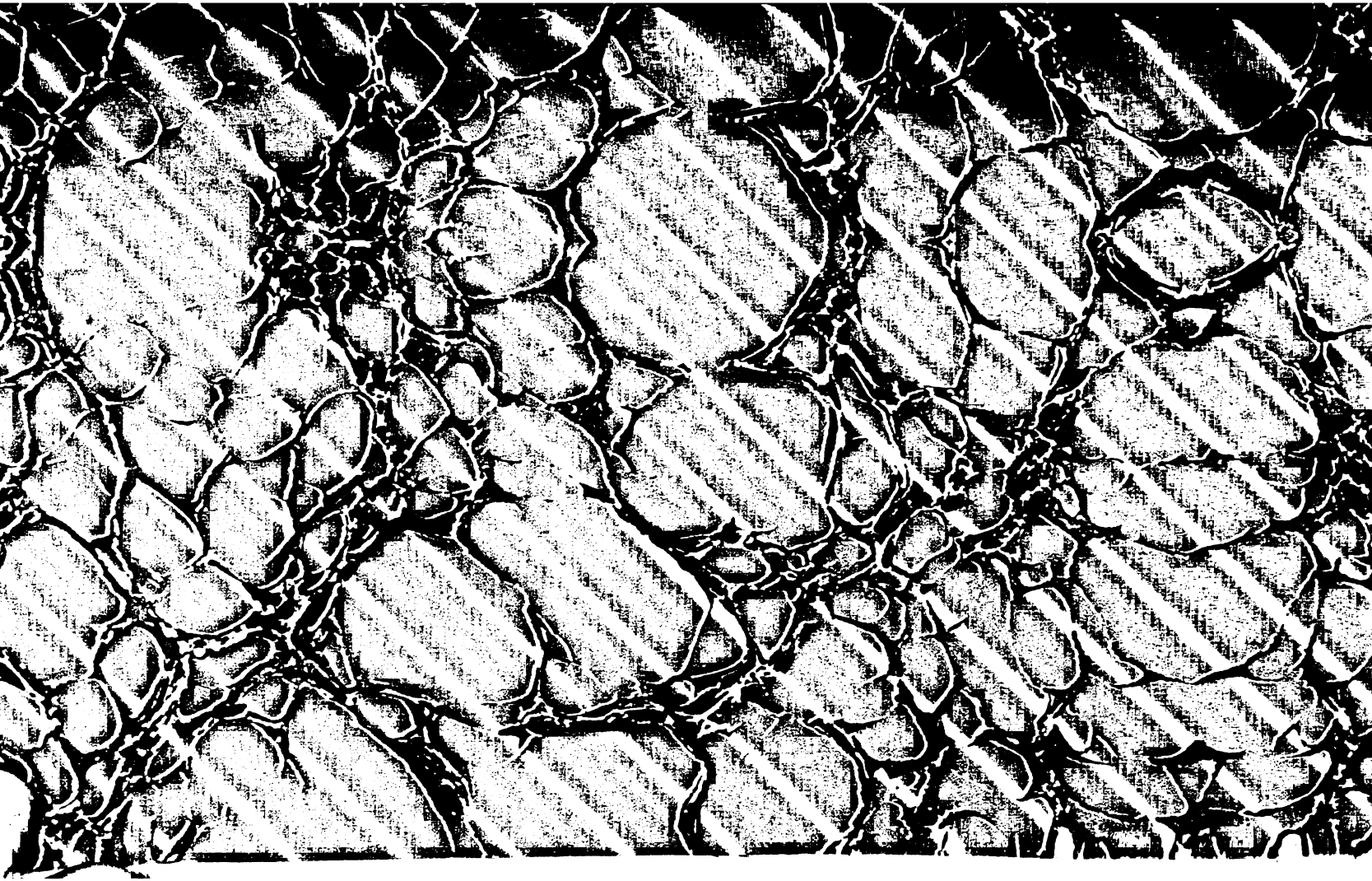

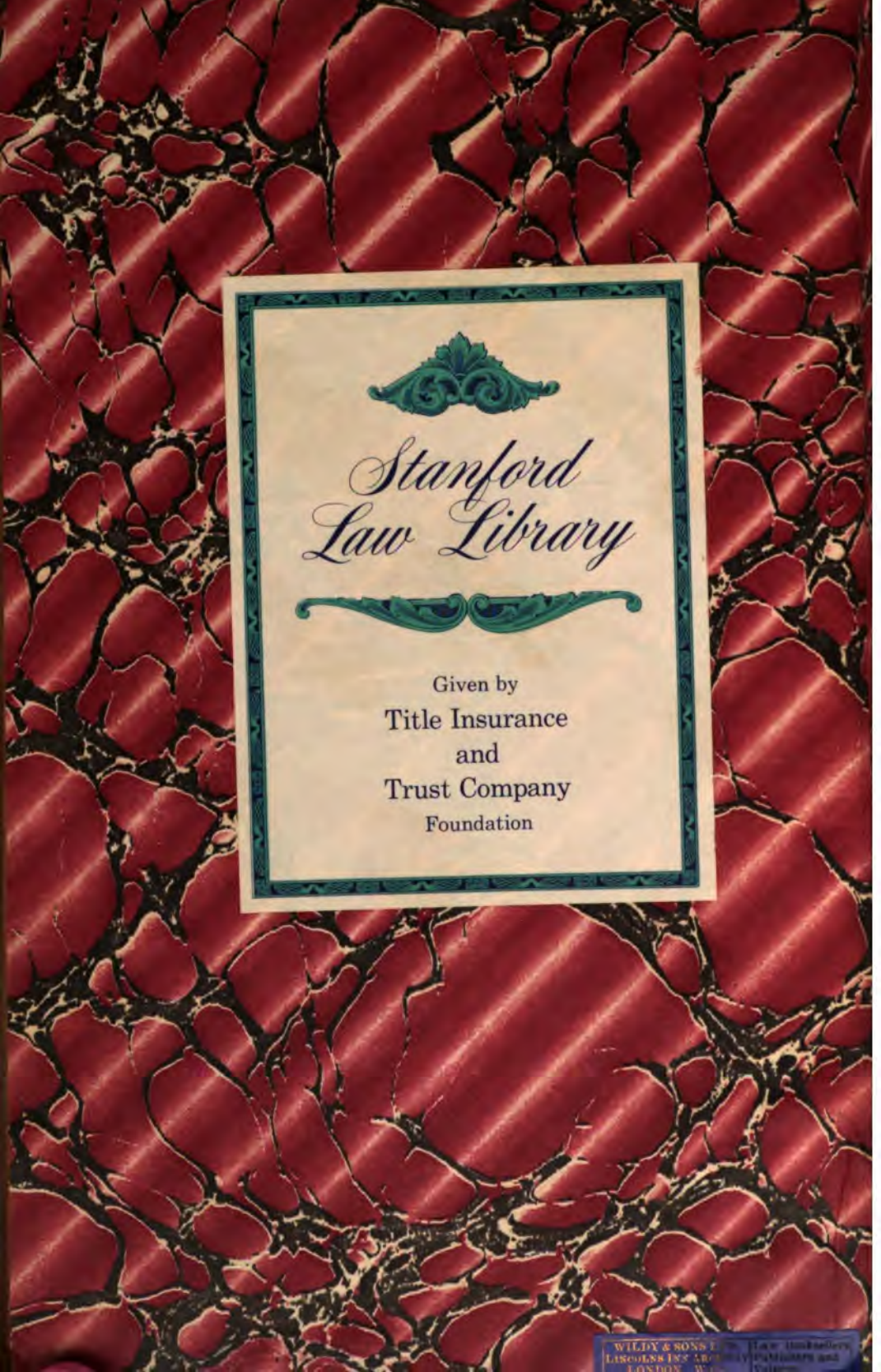
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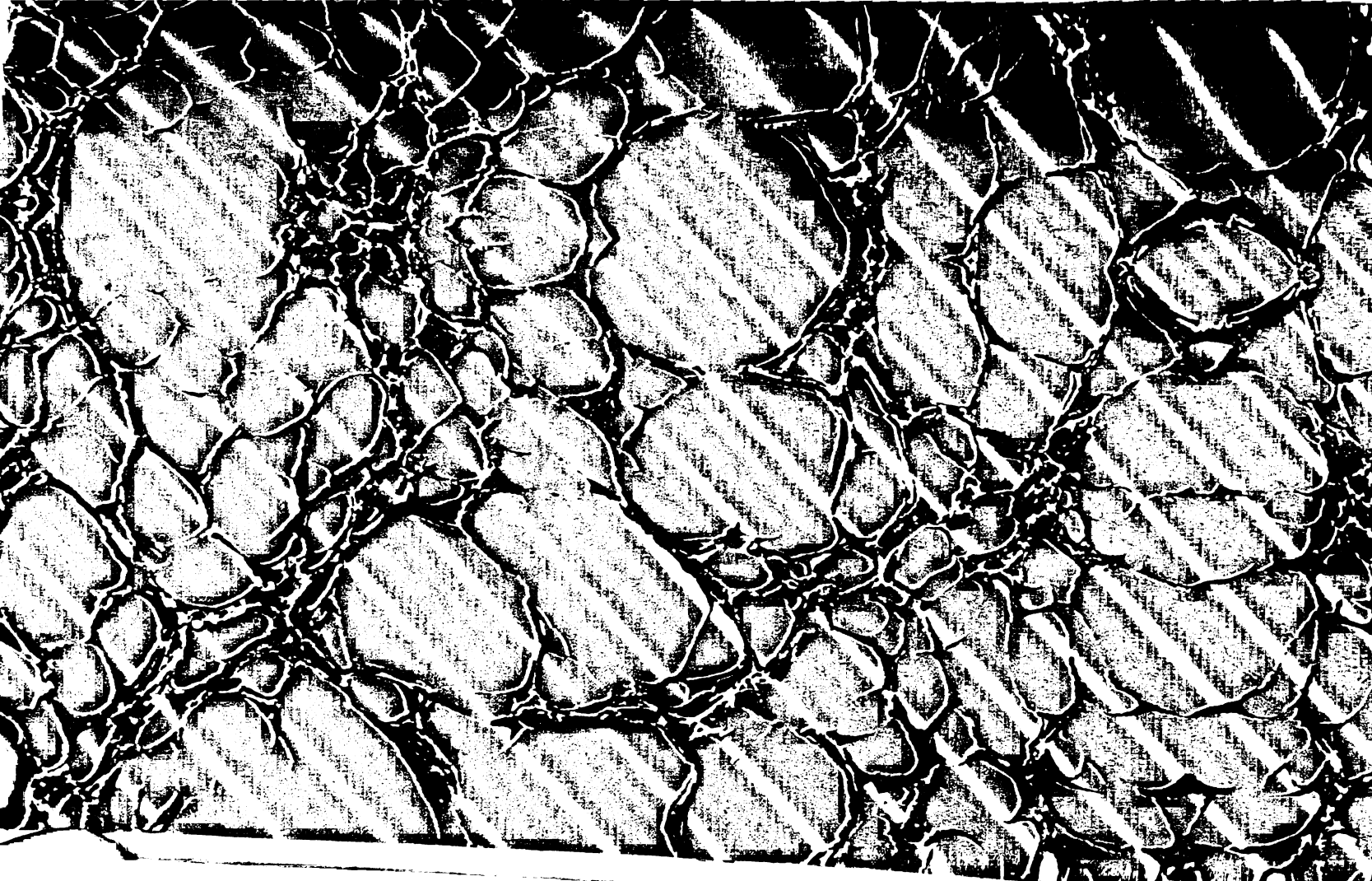

A

DIGEST

OF THE

Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE FIRST,

CONTAINING

Title 1. ESTATE IN FEE-SIMPLE.
2. ESTATE IN TAIL.
3. ESTATE FOR LIFE.
4. ESTATE TAIL AFTER POSSIBILITY.
5. CURTESY.
6. DOWER.
7. JOINTURE.
8. ESTATE FOR YEARS.
9. ESTATE AT WILL, &c.
10. COPYHOLD.
11. USE.
AND
12. TRUST.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, FLEET-STREET,
AND
J. COOKE, DUBLIN.
1804.

TO

THE RIGHT HONORABLE

JOHN LORD ELDON,

BARON OF ELDON,

IN THE COUNTY PALATINE OF DURHAM,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

THIS WORK

IS,

WITH HIS LORDSHIP'S PERMISSION,

RESPECTFULLY DEDICATED.

PREFACE.

ALTHOUGH the Law of Real Property forms the moſt extenſive and abſtruſe branch of our juriſprudence, yet no attempt has hitherto been made to reduce it to a diſtinct and comprehenſive ſyſtem. A Digeſt of this part of the Law is therefore here offered to the Profeſſion, in which a ſyſtematic diſtribution is framed of the general principles of each title, ſupported by abridgements of the caſes, in which thoſe principles have been eſtabliſhed or confirmed.

It is but of late years that this mode of treating legal ſubjects has been adopted. Our abridgements and treatiſes on particular titles of the law, formerly contained little more than a collection of the adjudged caſes that had been determined on each title; diſpoſed without

much method, and without eſtabliſhing or deducing any general principles.

There was, however, one eminent exception: the excellent Eſſay on Contingent Remainders by the late Mr. *Fearne*. The peruſal of that admirable work, firſt ſuggeſted to the author the idea of attempting to form a methodical arrangement of the general principles of the Law of Real Property; and upwards of twenty years ſince he ſubmitted to the Profeſſion his Eſſay on Fines, written avowedly on that plan.

The favourable reception with which the Profeſſion honoured that attempt, encouraged him to proceed in diſcuſſing all the other titles belonging to this part of the law in the ſame manner. In the proſecution of this work he became every day more ſenſible that the true mode of treating legal ſubjects, as well as other branches of ſcience, is by a ſyſtematic diſtribution of abſtract principles illuſtrated and ſupported by adjudged caſes. In this idea he was fully confirmed by the authority of the late Sir

William

William Jones, who has truly ſaid, "If law be "a ſcience, and really deſerve ſo ſublime a name, "it muſt be founded on principle, and claim an "exalted rank in the empire of reaſon. But if "it be merely an unconnected ſeries of decrees "and ordinances, its uſe may remain though "its dignity be leſſened: and he will become "the greateſt lawyer who has the ſtrongeſt "habitual or artificial memory*."

Although the portion of time which the author has been able to ſpare from the avocations of his profeſſion, has, for ſeveral years, been employed in the execution of this work, yet he is conſcious that many omiſſions, and, he fears, errors, may be diſcovered in it. But ſuch muſt be the caſe in every attempt of this nature. Thoſe who are moſt converſant in our law, will be moſt ſenſible of the impoſſibility of attaining, or even approaching to perfection. Such, indeed, is the condition of human knowledge, that the ſame obſervation is applicable to almoſt every branch of ſcience.

* Law of Bailments.

A late learned and reverend prelate has juſtly remarked, that "a ſyſtem ariſing from the "collection and arrangement of a multitude "of minute particulars, which often elude the "moſt careful ſearch, and ſometimes eſcape "obſervation, when they are moſt obvious, "muſt always ſtand in need of improvement*."

* Preface to Dr. Lowth's Grammar.

ANALYSIS OF THE DIGEST.

REAL PROPERTY.

1. Several Kinds.
   1. Corporeal or Land.
      Eſtates therein:
      1. Quantity of Intereſt.
         1. Freehold.
         2. Leſs than Freehold.
         3. Equitable.
         4. On Condition.
         5. As a Pledge or Security.
      2. Time of Enjoyment.
         1. Poſſeſſion.
         2. Remainder.
         3. Reverſion.
      3. Number and Connection of the Tenants.
         1. Severalty.
         2. Joint-tenancy.
         3. Coparcenary.
         4. In Common.
   2. Incorporeal.
      1. Advowſon.
      2. Tithes.
      3. Common.
      4. Ways.
      5. Offices.
      6. Dignities.
      7. Franchiſes.
      8. Rents.
2. Title thereto.
   1. Deſcent.
   2. Purchaſe.
      1. Eſcheat.
      2. Preſcription.
      3. Alienation.
         1. Deed.
         2. Matter of Record.
         3. Special Cuſtom.
         4. Deviſe.

TABLE OF THE TITLES.

Title 1. Eſtate in Fee-Simple.
2. Eſtate in Tail.
3. Eſtate for Life.
4. Eſtate Tail after Poſſibility.
5. Curteſy.
6. Dower.
7. Jointure.
8. Eſtate for Years.
9. Eſtate at Will, &c.
10. Copyhold.
11. Uſe.
12. Truſt.
13. Eſtate upon Condition.
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15. Mortgage.
16. Remainder.
17. Reverſion.
18. Joint-tenancy.
19. Coparcenary.
Title 20. Tenancy in Common.
21. Advowſon.
22. Tithes.
23. Common.
24. Ways.
25. Offices.
26. Dignities.
27. Franchiſes.
28. Rents.
29. Deſcent.
30. Eſcheat.
31. Preſcription.
32. Deed.
33. Private Act.
34. King's Grant.
35. Fine.
36. Recovery.
37. Alienation by Cuſtom.
38. Deviſe.

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ERRATA, VOL. I.

Page xxxii. col. 2. line 6. for *Trur* read *Fuer.*
11. in marg. for *Title* 26. read 30.
224. ſ. 18. line 1. for *this* read *there.*
261. in marg. add *Gregory.*
326. ſ. 13. laſt line, inſert *on.*
402. line 4. add *to.*
405. ſ. 10. laſt line, dele *not.*
409. line 6. for *nor* read *non.*
425. line 13. for *execute* read *executed.*
445. in marg. for *Title* 28. read 32.
455. line 14. for *C.* read *D.*
498. in marg. for ſ. 72. read 14.

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Page 4. ſ. 9. line 6. after *precedent* inſert *and.*
336. in marg. for *poſtumous* read *poſthumous.*
528. ſ. 27. firſt line, after *eſtate* inſert *in joint-tenancy.*

A

DIGEST

OF THE

Laws of England

RESPECTING

REAL PROPERTY.

TITLE I.

ESTATE IN FEE SIMPLE.

§ 1. *Of Real Property.*
3. *Land.*
5. *Manors.*
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Section 1.

Of Real Property.

BY the law of *England*, property is divided into two kinds, namely, real and perſonal property; which kinds are governed by diſtinct ſyſtems of juriſprudence. Real property conſiſts of land, and of all

rights and profits ariſing from or annexed to land, which are of a permanent and immoveable nature; it is uſually comprized under the words, lands, tene-
1 Inſt. 6 *a.* ments, and hereditaments. Land means the whole ſurface of the earth; tenement is a word of ſtill greater extent, and ſignifies every thing that may be holden, provided it be of a permanent nature; but hereditament is the largeſt and moſt comprehenſive word, for it includes not only lands and tenements, but whatever may be inherited.

§ 2. Real property is Corporeal, or Incorporeal. Corporeal property conſiſts wholly of ſubſtantial and permanent objects, all which may be comprehended under the general denomination of *Land*. Incorporeal property conſiſts of rights and profits ariſing from or annexed to land.

Show. Parl. Ca. 207. 2 Veſ. jun. 652. A ſhare in the *New River Water* is held to be real property, as alſo a ſhare in ſome navigable canals.

1 Inſt. 20 *a.* Offices exerciſeable within certain places, though not annexed to land, are alſo ſaid to favour of the
See Tit. 25. realty, and are therefore conſidered as real property.

Of Land. § 3. Lord *Coke* ſays, that the word land, in its
1 Inſt. 4 *a.* legal ſignification, comprehends any ground, ſoil, or earth whatſoever, as meadows, paſtures, woods, moors, waters, marſhes, furzes, and heath; it alſo legally includes all caſtles, houſes, and other buildings ſtanding thereon.

§ 4. Land

§ 4. Land has alſo in its legal ſignification an indefinite extent, upwards as well as downwards. For it is a maxim of law, that, *cujus eſt ſolum, ejus eſt uſque ad cœlum*, and downwards, whatever is in a direct line between the ſurface and the centre of the earth, ſuch as mines of metal, and other foſſils, is the property of the owner of the ſurface.

Of Manors.

§ 5. The greater part of *England* was formerly divided into manors; and as the word *manor* was, and even ſtill is, frequently uſed as ſynonymous with the lands compriſed within its boundaries; it will be proper, in this place, to enquire into the nature of manors.

Bract. 212, *a.*

Perk. ſ. 670.

§ 6. Where a conſiderable tract of land was granted by the king to a perſon of rank, to hold by a feudal tenure, the grantee gave the freehold of a part of it to his followers or retainers, to hold of him by ſome certain ſervices, and reſe[illegible]he reſt to himſelf for the maintenance of his fa[illegible], this latter part being in the occupation of the lord, was called his demeſne; and the reſidence of the lord being called in French *manoir*, the whole acquired from thence the name of a manor; although it is alſo called, and with more propriety, a ſeignory or lordſhip; that is, a tract of ground ſubject to a particular lord, who has a feudal juriſdiction over it.

Co. Cop. ſ. 31.

Gloſs. voce manerium.

§ 7. "*Manerium*," ſays *Spellman*, "*eſt feudum no-*
"*bile, partim vaſſalis, quos tenentes vocamus ab certa*
"*ſervitia conceſſum, partim domino in uſum familiæ*
"*ſuæ, cum juriſdictione in vaſſallos, ob conceſſa prædia*

" *reſervatum: quæ vaſſalis conceduntur, terras dicimus*
" *tenementales, quæ domino reſervantur dominicales.*
" *Totum vero feudum dominium appellatur, olim baronia,*
" *unde curia quæ huic præſt juriſdictioni, hodie curia*
" *baronis nomen retinet.*"

Co. Cop. ſ. 31. § 8. A manor is ſaid to conſiſt of demeſnes and ſervices. The freehold of the demeſnes was veſted in the lord, and they were cultivated by his villains for the uſe of his family. The ſervices were, the returns due by the perſons to whom the lord granted the freehold of the reſt of the lands, compriſed within the manor.

2 Inſt. 85. § 9. The uncultivated part of the manor was called the lord's waſte, and ſerved for public roads, and for common of paſture for the lord and his tenants. But although the preſumption is, that the lord of a manor is entitled to the ſoil of the waſtes, ſituated within the manor; yet any other perſon may exclude him, by proving acts of ownerſhip.

2 Wooddeſon 37.

§ 10. By the feudal law, where lands were granted to a perſon, he acquired a juriſdiction over the inferior tenants or occupiers of the land. In imitation of this principle, we find that ſoon after the eſtabliſhment of the feudal law in *England*, every lord of a manor claimed and exerciſed a juriſdiction over his freehold tenants, and held a court for that purpoſe, called the Court Baron, which was compoſed of the lord and his ſteward, and alſo of the freeholders who held their lands by fealty, ſuit of court, and rent, or military ſervice; and

and were, therefore, bound by their tenure, to aſſiſt their lord in the diſpenſation of juſtice.

§ 11. As a manor conſiſts of demeſnes and ſervices, theſe are ſufficient to ſupport the being of a manor. But whenever the demeſnes are ſevered from the manor, or the ſervices become extinct, then the manor itſelf is deſtroyed. Thus, in Sir *Moyle Finch*'s caſe, it was reſolved, that, where the demeſnes of a manor are once ſevered in fee-ſimple from the ſervices of the manor, the manor itſelf was deſtroyed for ever. 6 Rep. 64.

§ 12. So, where all the freehold eſtates of a manor are purchaſed by the lord, or eſcheat to him, the ſervices are thereby extinct, and the manor is deſtroyed. 2 Roll. Ab. 122.

§ 13. This is the reaſon of an expreſſion very common in law-books, that a court baron is eſſential to a manor; and, therefore, unleſs there are two freeholders at leaſt, holding of the manor, and ſubject to eſcheats, the court baron ceaſes for want of ſuitors, and the manor is thereby loſt. But, in point of fact, the manor becomes extinct by the loſs of the ſervices; one of which is ſuit of court; not by the loſs of the court baron, which is only a neceſſary conſequence of the loſs of the ſervices. 3 Term Rep. 447. 4 Term Rep. 446.

§ 14. Although many manors have been deſtroyed by the means above mentioned, yet they continue to be called manors, and, for ſome purpoſes, are ſtill

conſidered as ſuch; though, ſtrictly ſpeaking, they are no more than reputed manors.

Money to be laid out in Land.

Treaty of Eq. b. i. c. vi. ſ. 9.

Vide Walker v. Denne, 2 Veſ. jun. 170.

§ 15. Money agreed or directed to be laid out in the purchaſe of land, is conſidered, in equity, as land. Becauſe there, whatever is agreed to be done, is conſidered as actually done. But, where money directed to be laid out in the purchaſe of land falls into the hands of the perſon who would have had the abſolute property in the land, in caſe a purchaſe had been made, it will be conſidered as money.

Heir Looms.

1 Inſt. 8 *a.* 7 Rep. 17 *b.* Cro. Eliz. 372.

§ 16. There are ſome chattels which are conſidered as ſo annexed, and ſo neceſſary, to the enjoyment of the inheritance, that they are deemed, in law, to be a part of it, and are called *heir looms*. Thus, deer in a real authorized park, fiſhes in a pond, rabbits in a warren, and doves in a dove-houſe, are held to be part of the inheritance, and belong to the heir.

It is the ſame of charters, court-rolls, deeds, and other evidences of the land; together with the cheſts or boxes in which they are contained.

Puſey v. Puſey, 1 Vern. 273.

§ 17. Where an antique horn had immemorially gone with the eſtate, and was delivered to the plaintiff's anceſtors to hold their land by; it was decreed that it ſhould go with the land, as an heir loom.

Of Eſtates in Land.

§ 18. With reſpect to the nature and properties of the different eſtates which may be acquired in land, it

it is neceſſary to premiſe, that an eſtate in land ſignifies ſuch an intereſt as the tenant hath therein. It is called, in *Latin*, *ſtatus*; becauſe it ſignifies the condition or circumſtance in which the owner ſtands, with regard to his property; and, to aſcertain this with preciſion and accuracy, eſtates may be conſidered in a threefold view. Firſt, with regard to the quantity of intereſt which the tenant has in his tenement; ſecondly, with regard to the time at which that quantity of intereſt is to be enjoyed; and, thirdly, with regard to the number and connection of the tenants. 1 Inſt. 345 *a*. 2 Comm. 103.

§ 19. With regard to the quantity of intereſt which the tenant has in the tenement, the primary diviſion of eſtates, is, into ſuch as are freehold, and ſuch as are leſs than freehold. Eſtates of Freehold.

An eſtate of freehold is an eſtate in lands, or other real property, held by a free tenure for the life of the tenant, or of ſome other person or for ſome uncertain period. It is called *liberum tenementum*; frank tenement, or freehold; and was formerly deſcribed to be an eſtate conveyed by livery of ſeiſin; which is the ſolemn delivery of the poſſeſſion by the donor to the donee in the preſence of witneſſes: but, ſince the introduction of certain modern conveyances, by which an eſtate of freehold may be created without livery of ſeiſin, this deſcription is not ſufficiently comprehenſive. 2 Comm. 104.

§ 20. There are two qualities eſſentially requiſite to the exiſtence of a freehold eſtate. 1ſt. Immobility; that is, the ſubject matter muſt either be land, or ſome intereſt 2 Comm. 386.

intereſt iſſuing out of land. 2d. A ſufficient legal indeterminate duration: for, if the utmoſt period to which an eſtate can laſt is fixed and determined, it is not an eſtate of freehold.

1 Inſt. 42 *a.*

§ 21. Thus, if lands are conveyed to a man and his heirs, or to a man for his life, or for the life of another, or until he is married, or goes to *Rome*, he has an eſtate of freehold. But if lands are limited to a man for 500 years, or for 99 years, if he ſhall ſo long live, he has not an eſtate of freehold. And the law was preciſely the ſame in this reſpect when *Bracton* wrote: "*Et ſciendum quod liberum tenementum eſt "id quod quis tenet ſibi et hæredibus ſuis. Item ut "liberum tenementum ſicut ad vitam tantum, vel eodem "modo ad tempus indeterminatum, abſque alia certa "temporis præfinitione; ſc. donec quid fiat vel not fiat; "ut ſi dicatur, do tali, donec ei providero. Liberum "autem tenementum non eſt dici alicujus, quod quis "tenet ad certum nu[illegible] annorum, menſium vel di- "erum; licet ad terminum centum annorum, quæ ex- "cedit vitas hominum.*"

Bract. 207 *a.*

§ 22. Upon the introduction of the feudal law into *England*, all lands became holden, either by a free tenure, or in villenage. The tenant, who held by a free tenure, had always a right to the enjoyment of the land for his life at leaſt; and could not be diſpoſſeſſed, even for the nonpayment of his rent, or the nonperformance of his ſervices: whereas the tenant who held in villenage, might be turned out at pleaſure by his lord; and his poſſeſſion being perfectly precarious,

Black. Tra. 4to. 233.

rious, was conſidered to be the poſſeſſion of his lord; to whom he was, in a great degree, a mere ſlave.

§ 23. The perſon thus holding lands by a free tenure, was, therefore, called a *freeholder*, becauſe he might maintain his poſſeſſion againſt his lord: and, for this reaſon, *liberum tenementum*, or freehold, was oppoſed to villenage. Thus, *Bracton* ſays: "*Item dicitur liberum tenementun, ad differentiam ejus quod eſt villenagium; quia tenementorum aliud liberum, aliud villenagium.* 207 *a.*

§ 24. Lord *Coke* ſays, that a freehold eſtate may, at ſeveral times, be moveable; ſometimes in one perſon, and, *alternis vicibus*, in another. As, if there be eighty acres of meadow which have been uſed time out of mind to be divided between certain perſons, and that a certain number of acres appertain to every of theſe perſons, to be yearly aſſigned and allotted to them, they have freehold eſtates in their reſpective portions of the meadow. 1 Inſt. 4 *a.*

§ 25. The acquiſition of an eſtate of freehold was attended with ſeveral valuable rights and privileges. The freeholder became a member of the county court, one of the *pares curiæ* in the lord's court, was intitled to be ſummoned on juries in the king's court, and to vote for the election of knights of the ſhire.

§ 26. In ſubſequent times, the word *freehold* was, in ſome caſes, applied to the intereſt of the tenant only: as where a perſon had an eſtate for life in lands held

held in villenage, he was ſaid to have a freehold intereſt. Thus Lord *Coke* ſays, "a freehold is taken "in a double ſenſe, either it is named a freehold in "reſpect of the ſtate of the land, and ſo copyholders "may be freeholders. For any that hath an eſtate "for his life, or any greater eſtate in any land what-"ſoever, may, in this ſenſe, be termed a freeholder; "or in reſpect of the ſtate of the law, and ſo it is "oppoſed to copyholders, that what land ſoever is "not copyhold is freehold."

Co. Cop. ſ. 15.

§ 27. It is, however, fully proved by Sir *William Blackſtone*, in a tract intitled "Conſiderations on Copyholders," that no perſon can be conſidered as a freeholder, or intitled to the privileges of a freeholder, unleſs his eſtate conſiſts of free land. So that, although the determination of an eſtate be uncertain, yet, if it is held by a baſe tenure, it is not conſidered in law as a freehold; nor has the tenant any of thoſe privileges which the law gives to freeholders: for, in that caſe, he has a freehold intereſt only; whereas no eſtate is, ſtrictly ſpeaking, a freehold, unleſs the poſſeſſor has a freehold tenure, as well as a freehold intereſt.

§ 28. It has been ſtated, that offices, exerciſable within certain places, are conſidered as real property. In conſequence of this doctrine, a freehold eſtate may be had in ſuch offices,

Ante, ſ. 2.

What perſons may hold freehold eſtates.

§ 29. All natural perſons, born within the dominions of the crown of *England*, are capable of holding freehold eſtates; unleſs they are attainted of treaſon, or felony,

felony, or have incurred the penalties of a premunire; for, in that caſe, they are conſidered as civilly dead, and are thereby become incapable of poſſeſſing any property.

§ 30. Bodies corporate, whether ſole or aggregate, eccleſiaſtical or lay, may hold thoſe freehold eſtates which have been tranſmitted to them by their predeceſſors: they are, however, prohibited by ſeveral antient and modern ſtatutes, uſually called the *ſtatutes of mortmain*, from purchaſing more lands, without licence from the crown; nor is even ſuch licence, in all caſes, ſufficient.

§ 31. But aliens, that is, perſons born out of the dominions of the crown of *England*, (except the children and grand-children of natural-born ſubjects), are incapable of holding freehold eſtates, unleſs they are made denizens by the king's letters patent, or naturalized by act of parliament.

1 Inſt. 2 *b.*

Vide Tit. 26.

Dupleſſis *v.* Attor. Gen. Dom. Proc. 1753. 1 Brow. 415.

§ 32. In conſequence of the ſtat. 12 *Cha.* 2. c. 24. the tenure of all freehold eſtates, whether held of the king or of meſne lords, except lands held by religious corporations, is turned into free and common ſocage; and where, in a grant of freehold lands, no ſervices are reſerved, as is now generally the caſe, fealty is notwithſtanding incident to the tenure: and all lords, of whom lands are holden at this day, may call upon their tenants to take the oath of fealty to them in their courts baron; which every lord ought to do, if it be only for the reaſon given by *Littleton*, that when neglected,

Tenure by which Freeholds are holden.

Lit. ſ. 130, 131. 1 Inſt. 68 *b.* n. 5. 85 *a.* n. 1. 93 *a.* n. 2.

neglected, it will, by long continuance of time, grow out of memory, (as doubtleſs it frequently has done), whether the land be holden of the lord or not, and ſo he may loſe his ſeignory, and the profits which may accrue to him by eſcheats and other contingencies.

Booth's Real. Act. 135.

§ 33. Where it is no longer known of whom lands are mediately holden, they ſhall be preſumed to be held of the king, as the great and chief lord.

2 Inſt. 66. 5co.

Bradſhaw v. Lawſon, 4 Term R. 443.

§ 34. In conſequence of the ſtatute *Quia emptores terrarum*, no perſon can reſerve a tenure to himſelf, where he conveys away the whole eſtate: but the lands will, after ſuch conveyance, be held of the next immediate lord, by the ſame ſervices by which the feoffor held; or *pro rata*, if the feoffment be only of part.

Of Seiſin.

1 Inſt. 266*b*. n. 1. 1 Burr. Rep. 107.

§ 35. The poſſeſſion of a feud was expreſſed in law, by the word *ſeiſin*, which denotes the completion of that inveſtiture by which the tenant was admitted to the feud. Upon the introduction of the feudal law into *England*, this doctrine was fully adopted, and the word ſeiſin was only applied to the poſſeſſion of an eſtate of freehold; in contradiſtinction to that precarious kind of poſſeſſion, by which tenants in villenage held their lands, which was conſidered to be the poſſeſſion of their lords, in whom the freehold of their lands continued to be veſted.

1 Inſt. 200*b*. Plow. 503.

Where an Entry is neceſſary.

§ 36. Where an eſtate is conveyed to a perſon by feoffment, with livery of ſeiſin, or by any of thoſe conveyances

ances which derive their effect from the ſtatute of uſes, he acquires a ſeiſin in deed. But where an eſtate comes to a perſon by act of law, as by deſcent, he only acquires a ſeiſin in law, that is, a right to the poſſeſſion; and he muſt make an entry on the land, either in perſon or by attorney, in order to acquire a ſeiſin in deed.

Lit. ſ. 448. 1 Inſt. 29 *a*.

§ 37. The mere act of going on the land will not amount to a legal entry, ſufficient to veſt the actual ſeiſin in the perſon who has the right: for, in order to conſtitute a legal entry, the perſon muſt enter with that intent, and do ſome act to ſhow ſuch intention.

1 Inſt. 245 *b*. Plow. 92, 93. 6 Mod. 44.

§ 38. The entry of the heir upon any part of the eſtate will give him a ſeiſin in deed of all the lands lying in the ſame county. For ſince the freehold in law is caſt upon him by the death of his anceſtor, and no perſon is in poſſeſſion, ſo that no particular eſtate is to be defeated, a general entry into part, will be ſufficient to reduce the whole into actual poſſeſſion. But where the lands lie in ſeveral counties, there muſt be an entry in each county.

1 Inſt. 252 *b*.

§ 39. The entry of the heir is only neceſſary where the lands are in the actual occupation of his anceſtor. For if the lands are held under a leaſe for years, and the leſſee had entered under his leaſe, the heir will be conſidered as having a ſeiſin in deed, before entry or receipt of rent; becauſe the poſſeſſion of the leſſee for years, is his poſſeſſion.

1 Inſt. 15 *a*. 3 Wilſ. Rep. 521. 7 Term Rep. 390. 8 Term Rep. 213.

§ 40. Where

§ 40. Where lands are let on leaſes for lives, the freehold is in the leſſees, and, conſequently, the heir has no immediate right of entry, on the death of his anceſtor. In this caſe, the heir is only entitled to the rent reſerved in the leaſe; by the receipt of which, he becomes ſeiſed of the rent, and of the reverſion expectant on the determination of the leaſe.

3 Wilſ. Rep. 527.

§ 41. The poſſeſſion of a guardian in ſocage, is the poſſeſſion of the ward. So that, if a widow, having a ſon on whom her huſband's eſtate deſcends, continues in poſſeſſion after her huſband's death, the law will conſider her as guardian in ſocage to her ſon; and will therefore admit the ſon to have had, by that means, a ſeiſin in deed of the land.

Abatement.

Perk. ſ. 367. 3 Comm. 167. 174.

§ 42. The ſeiſin in law, which the heir acquires on the death of his anceſtor, may be defeated by the entry of a ſtranger, claiming a right to the land; and ſuch entry is called an *abatement*. In a caſe of this kind, the only mode of regaining the ſeiſin and poſſeſſion, is, by an entry of the legal owner, which will reſtore him to the poſſeſſion of the land.

2 Comm. 175.

§ 43. If the heir be deterred from entering by bodily fear, he may make claim as near to the eſtate as he can; which claim is only in force for a year and a day. And this claim, if it be repeated once in the ſpace of every year and day, (which is called Continual Claim), has the ſame effect as a legal entry.

§ 44. Where

§ 44. Where a younger brother enters upon the death of the anceſtor, ſuch entry is not an abatement. For it ſhall be intended that the younger brother did not ſet up a new title, but only entered to preſerve the poſſeſſions of the anceſtor in the family, that no one elſe ſhould abate. And if the younger ſon dies ſeiſed, ſtill the elder ſon may enter: for, as the law will not intend the entry of the younger ſon to be a wrongful act, therefore, the poſſeſſion of the younger brother becomes that of the elder; ſo that the deſcent cannot make a right of poſſeſſion diſtinct from the right of property. Lit. ſ. 396. Gilb. Ten. 27.

§ 45. Where a perſon is in the actual ſeiſin of an eſtate of freehold, he may loſe that ſeiſin by a ſtranger's entering on the eſtate, and forcibly ouſting or diſpoſſeſſing him of it, which is called a *diſſeiſin*; and is thus defined by *Littleton*. "Diſſeiſin is properly "where a man entereth into any lands or tenements, "where his entry is not congeable, and ouſteth him "which hath the freehold." And Lord *Coke*, in his comment on this paſſage, obſerves, that every entry is not a diſſeiſin, unleſs there be an ouſter of the freehold. Of Diſſeiſin. Lit. ſ. 279.

§ 46. There is ſcarcely a ſubject in the *Engliſh* law ſo obſcure and difficult as that of diſſeiſin. The full effect of diſſeiſins muſt formerly have been, not only a dipoſſeſſing of the freeholder, but alſo, a ſubſtitution of the diſſeiſor as tenant to the lord, and as one of the *pares curiæ*, in the place of the diſſeiſee. Now, as the conſent of the lord was formerly neceſſary to the admiſſion 1 Inſt. 266 *b.* n. 1. 3 Comm. 169.

miſſion of a new tenant into the feud, it is difficult to conceive, how a complete diſſeiſin could take place without the conſent or connivance of the lord. Hence Lord *Mansfield* has juſtly obſerved, that "the preciſe "definition of what conſtituted a diſſeiſin, which made "the diſſeiſor the tenant to the demandant's præcipe, "though the right owner's entry was not taken away, "was once well known, but it is not now to be found. "The more we read, unleſs we are very careful to diſ-"tinguiſh, the more we ſhall be confounded: for after "the aſſiſe of novel diſſeiſin was introduced, the legiſ-"lature, by many acts of parliament, and the courts "of law, by liberal conſtructions, in furtherance of "juſtice, extended this remedy, for the ſake of the "owner, to every treſpaſs or injury done to his real "property; if, by bringing his aſſiſe, he thought fit "to admit himſelf diſſeiſed"

1 Burr. Rep. 110.

Abeyance of the Freehold.

§ 47. Where there is no perſon *in eſſe*, in whom the freehold is veſted, it is ſaid to be in *abeyance*; that is, in expectation, remembrance, and contemplation of law. But it is a principle of the higheſt antiquity in the *Engliſh* law, that there ſhould always be a particular owner to every freehold eſtate, ſo that the freehold ſhould never be in abeyance, if it could be avoided. This rule was eſtabliſhed for two reaſons: 1ſt, That the ſuperior lord might always know on whom he was to call for the military ſervices that were due for the feud: for otherwiſe the defence of the realm would have been conſiderably weakened. 2dly, That every ſtranger, who claimed a right to any particular lands, might know againſt whom he ought to bring his præcipe,

2 Inſt. 342 *b.* 2 Comm. 107.

Hob. 338.

præcipe, or real action, for the recovery of them; as no real action could be brought againſt any perſon but the actual freeholder.

§ 48. In conſequence of this doctrine, it is a rule of law, that a freehold eſtate cannot be created to commence *in futuro*; becauſe, in that caſe, the freehold would be in abeyance, from the execution of the conveyance, until the moment when the eſtate ſo created was to commence. 1 Inſt. 317 *a.*

§ 49. "Eſtates of freehold," ſays Sir *William Black-* Eſtates of Inheritance,
"*ſtone*, are either eſtates of inheritance, or eſtates not of 2 Comm. 104.
"inheritance. The former are again divided into in-
"heritances abſolute or fee ſimple, and inheritances
"limited; one ſpecies of which we uſually call
"fee tail."

§ 50. "Tenant in fee-ſimple," ſays *Littleton*, ſ. 1. "is Eſtate in Fee Simple.
"he which hath lands or tenements to hold to him and
"his heirs for ever; and it is called in *Latin*, *feodum*
"*ſimplex*; for *feodum* is the ſame that inheritance is,
"and *ſimplex* is as much as to ſay, lawful or pure:
"and ſo *feodum ſimplex* ſignifies a lawful or pure
"inheritance."

§ 51. *Littleton* has been cenſured for annexing an Wright's Ten. 149.
improper meaning to the word fee in this definition; and it has been contended that the word fee ſignifies land holden of a ſuperior lord, by military or other ſervices. But although this was certainly the original meaning of the word, yet when the feudal law was

fully eſtabliſhed here, and it was univerſally acknowledged that all the lands in *England* were held mediately or immediately of the king, and that there was no allodial property left in the kingdom, the word fee became generally uſed to denote the quantity of eſtate and intereſt in the land. Thus it appears from *Bracton*, that the word *feodum* was often uſed, at the time he wrote, in both theſe ſenſes.—" *Et ſciendum quod feo-* " *dum eſt quod quis tenet ex quacunque cauſa ſibi et* " *hæredibus ſuis. Item dicitur feodum alio modo* " *ejus qui alium feoffat, et quod quis tenet ab alio, ut* " *ſi ſit qui dicat talis tenet de me tot feoda per ſervi-* " *tium militare.*" And it is evidently for the purpoſe of denoting the quantity of intereſt, that the word fee is uſed in pleading an inheritance in the king, *viz.*— *Rex ſeiſitus fuit in dominico ſuo ut de feodo;* where the word *feodum* cannot poſſibly import an eſtate holden, the king not holding of any ſuperior lord, but merely denotes an inheritance.

Bract. 263 *b.*

1 Inſt. 1 *b.*

An Eſtate in Fee-Simple is the entire Property.

Lit. ſ. 11. Vaugh. R. 269.

§ 52. An eſtate in fee-ſimple is the entire and abſolute property of the land; from which it follows, that no perſon can have a greater eſtate or intereſt: and whenever a perſon grants away an eſtate in fee-ſimple, he cannot make any farther diſpoſition of it, becauſe he has already granted the whole and entire property, and conſequently nothing remains in him.

§ 53. An eſtate in fee-ſimple, created by a conveyance deriving its effect from the ſtatute of uſes, or by a deviſe, may however be rendered defeaſible upon the

the happening of ſome future event; of which an account will be given hereafter.

§ 54. Tenant in fee-ſimple is the abſolute maſter of all houſes and other buildings erected on the land; and alſo of all trees growing thereon; for trees are conſidered as parcel of the inheritance, and the law does not favor the ſeverance of trees from the freehold and inheritance of the land, becauſe the trees would be thereby waſted and deſtroyed.

Vide 1 Ld. Raym. 182.

§ 55. Tenant in fee-ſimple is alſo intitled to all mines of metal and other foſſils which are under the land, and may work and diſpoſe of them; except mines of gold and ſilver, which by the royal prerogative belong to the king.

Plowd. 315.

§. 56 We have ſeen that the law requires the freehold ſhould never, if poſſible, be in abeyance: but where there is a tenant of the freehold, the reverſion may exiſt for a time without any preciſe or particular owner; and, in ſuch caſe, it is ſaid to be in *abeyance*. Thus, if an eſtate be limited to *A.* for life, remainder to the right heirs of *J. S.*, the fee-ſimple is in abeyance during the life of *J. S.*, becauſe of the maxim in law, *nemo eſt hæres viventis* (*a*). And in the caſe of rectories and vicarages, the fee-ſimple is always in abeyance.

Abeyance of the Fee.

1 Inſt. 342 *b.* 2 Comm. 107.

(*a*) It has lately been held, that in ſome caſes of this kind the fee remains in the grantor. Vide Fearne Cont. Rem. 513. 533.

Hargrave's Tra. 449. 567.

§ 57. The law, however, does not even favour the abeyance of the fee-ſimple; for, in that caſe, many operations of law are ſuſpended. The particular tenant is rendered diſpuniſhable for waſte, as a writ of waſte can only be brought by the perſon entitled to the fee-ſimple. The title, if attacked, could not be completely defended, for there was no one in being whom the tenant of the freehold could pray in aid, to ſupport his right: nor could the mere right itſelf, if ſubſiſting in a ſtranger, be recovered in this interval; for in a writ of right patent, a tenant for life cannot join in the mere right. And, in modern times, the courts do not favour the abeyance of the fee-ſimple, becauſe it would be a reſtraint on alienation.

All other Eſtates merge in the Fee-Simple.

§ 58. All inferior eſtates are derived out of the fee-ſimple, ſo that, whenever a particular eſtate, or limited intereſt in land, veſts in the perſon who has the fee-ſimple of the ſame land, ſuch particular eſtate or intereſt is immediately drowned or merged in it; upon the principle, that *omne majus continet in ſe minus.*

Incidents to a Fee-Simple.

§ 59. The law has annexed to every eſtate and intereſt in lands, certain peculiar incidents, rights, and privileges, which, in general, are ſo inſeparably attached to thoſe eſtates, that they cannot be reſtrained by any proviſo or condition whatever.

Alienable.

Lit. ſ. 360. 1 Inſt. 223 *a.*

§ 60. Of the ſeveral incidents inſeparably annexed to an eſtate in fee-ſimple, the firſt is an unlimited power of alienation. Any reſtriction, therefore, of this power, annexed

annexed to the creation of an eſtate in fee-ſimple, would be abſolutely void.

This unlimited power of alienation compriſes, in itſelf, all inferior powers; ſo that a tenant in fee-ſimple may create any inferior eſtate or intereſt out of his own. And therefore a cuſtom, that a tenant in fee-ſimple cannot demiſe his lands for more than ſix years, is void; becauſe it is contrary to the freedom of the eſtate of one who hath a fee-ſimple.

Salford's caſe, Dyer, 357 *b.* 3 Veſ. jun. 325.

§ 61. An eſtate in fee-ſimple will deſcend to the heirs-general of the perſon who was laſt ſeiſed thereof, whether male or female, lineal or collateral. And it is for this reaſon that the word ſimple is added to the word fee, importing an abſolute inheritance, clear of any condition, limitation, or reſtriction, to particular heirs; in contradiſtinction to ſome other kinds of eſtates of inheritance, which are only deſcendible to ſome particular heirs; of which, an account will be given in the next title.

Deſcendible to Heirs General.

§ 62. Eſtates in fee-ſimple are ſubject to curteſy and dower; which ſubjects will be diſcuſſed under thoſe titles.

Subject to Curteſy and Dower.

§ 63. Eſtates in fee-ſimple are liable to the payment of all debts contracted by the tenant, for which he has acknowledged any ſecurity on record, or for which he has bound himſelf and his heirs, by any inſtrument under his ſeal. And his heir is bound to ſatisfy ſuch debts as far as the lands deſcended to him from ſuch anceſtor

Liable to Debts.

Buckley v. Nightingale, 1 Stra. R. 665.

anceſtor will extend; which ſufficient lands are called, in law, *aſſets by deſcent.* It ſhould, however, be obſerved, that eſtates in fee are not liable to the payment of ſimple contract debts; a doctrine not very conſonant with natural juſtice.

§ 64. By the common law, if the heir had aliened the aſſets before an action was brought againſt him for the recovery of a debt due by his anceſtor, the creditor was without any remedy. But now, by the ſtatute 3 *William* and *Mary*, c. 14. it is enacted, "That in all caſes where any heir at law ſhall be liable "to pay the debt of his anceſtor, in regard to any "lands, tenements, or hereditaments, deſcended to "him, and ſhall ſell, alien, or make over the ſame, "before any action brought or proceſs ſued out againſt "him, that ſuch heir at law ſhall be anſwerable for "ſuch debt or debts in an action or actions for debt, "to the value of the ſaid land ſo by him ſold, aliened, "or made over; in which caſe, creditors ſhall be pre-"ferred, as in actions againſt executors and admini-"ſtrators; and ſuch execution ſhall be taken out upon "any judgement or judgements ſo obtained againſt "ſuch heir to the value of the ſame land, as if the "ſame were his own proper debt or debts, ſaving "that the lands, tenements, and hereditaments, *bonâ* "*fide* aliened before the action brought, ſhall not be "liable to ſuch execution."[22]

Forfeited for Treaſon and Felony.
2 Hawk. P.C. ch. 4. ſ. 1.

§ 65. Eſtates in fee-ſimple are forfeitable on an attainder of treaſon: and the lands whereof a perſon attainted dies ſeiſed in fee, become actually veſted in the king, without

without any office, becauſe they cannot deſcend on account of the corruption of blood of the perſon laſt ſeiſed; and the freehold ſhall not be in abeyance.

§ 66. An eſtate in fee-ſimple is ſtill ſo far conſidered as a ſtrict feud, and the tenant thereof is ſo far bound to perform the feudal duties and ſervices which remain due, that, if he diſclaims upon record to hold his land of his lord, it will operate as a forfeiture of his eſtate, and the lord may thereupon have a writ of right upon a diſclaimer, for the recovery of the land. And for Diſclaimer. 1 Inſt. 102 *a.* Finch, 270. Booth's R. Act. 133.

But if the lord accepts of rent from the tenant after the diſclaimer, he will be thereby barred of his writ. 2 Leon. 271.

§ 67. Lord *Coke* ſays, "Of fee-ſimple, it is commonly holden that there be three kinds, viz. fee-ſimple abſolute, fee-ſimple conditional, and fee-ſimple qualified, or a baſe fee. But the more genuine and apt diviſion were to divide fee, that is, inheritance into three parts, viz. ſimple or abſolute, conditional, and qualified or baſe. For this word ſimple properly excludeth both conditions and limitations, that defeat or abridge the fee." Of Qualified Fees. 1 Inſt. 1 *b.* 10 Rep. 97 *b.*

§ 68. The nature of an eſtate in fee-ſimple abſolute, has been already ſtated. But where an eſtate of inheritance has a qualification annexed to it, by which it is provided, that ſuch eſtate muſt determine whenever that qualification is at an end, it is then called a *Qualified* or *Baſe Fee.* As, in the caſe of a grant to *A.* and his heirs, tenants of the manor of *Dale*; when- 1 Inſt. 27 *a.*

ever the heirs of *A.* ceaſe to be tenants of the manor of *Dale*, their eſtate determines.

Id. n. 6.

§ 69. Lord *Hale* gives the following inſtance of a qualified or baſe fee: "King *Henry* 3. *dedit manerium de Penrith et Sourby Alexandro regi Scotiæ, et hæredibus ſuis, regibus Scotiæ.*" And *Alexander* having daughters, of which, one was married to the Earl of *Huntingdon*, died, not having any heir king of *Scotland*, *et ea de cauſa*, King *Edward* the Firſt recovered ſeiſin, and the co-heirs of *Alexander* were excluded.

10 Rep. 97 *b.* Plowd. 557.

§ 70. Where a perſon holds an eſtate to him and his heirs, as long as *A. B.* has heirs of his body, this is a qualified or baſe fee, which will be treated of in the next title.

§ 71. The proprietor of a qualified or baſe fee has the ſame rights and privileges over his eſtate, until the qualification upon which it is limited is at an end, as if he were tenant in fee-ſimple. With reſpect to conditional fees, they will be treated of in the next title.

TITLE

TITLE II.

ESTATE TAIL.

CHAP. I.

Of the Origin and Nature of Eſtates Tail.

CHAP. II.

Of the Power of Tenant in Tail over his Eſtate and the Modes of barring it.

CHAP. I.

Of the Origin and Nature of Eſtates Tail.

§ 1. *Of Conditional Fees.*
8. *Of the Statute De Donis.*
12. *Deſcription of an Eſtate Tail.*
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Section 1.

Of Conditional Fees.

DONATIONS of land were originally ſimple and pure, without any condition or modification annexed to them; and the eſtates, created by ſuch donations, were held in fee-ſimple. In courſe of time, however,

however, it became cuſtomary to make donations of a more limited nature, by which the gift was reſtrained to ſome particular heirs of the donee, excluſive of others; as to the heirs of a man's body, by which only his lineal deſcendants were admitted, in excluſion of collateral heirs; or to the heirs male of his body, in excluſion both of collateral heirs, and lineal female deſcendants.

Lib. ii. ch. 6.

§ 2. Thus *Bracton*, in treating of donations, ſays, "*Item ſicut ampliari poſſunt hæredes, ſicut prædictum* "*eſt, ita coarctari poterunt per modum donationis, quod* "*omnes hæredes generaliter ad ſucceſſionem non vocan-* "*tur. Modus enim legem dat donationi, et modus te-* "*nendus eſt contra jus commune, et contra legem, quia* "*modus et conventio vincunt legem: ut ſi dicatur do* "*tali tantam terram cum pertinentiis in N. habendum et* "*tenendum ſibi et hæredibus ſuis, quos de carne ſua et* "*uxore ſibi deſponſata procreatos habuerit, vel ſic, do* "*tali et tali uxori ſuæ, vel cum tali filia mea, &c. ha-* "*bendum et tenendum ſibi et hæredibus ſuis, de carne* "*talis uxoris vel filiæ, exeuntibus, vel procreatis vel* "*procreandis: quo caſu cum certi hæredes exprimantur* "*in donatione, videri poterit quod tantum ſit deſcenſus* "*ad ipſos hæredes communes, per modum in donatione* "*appoſitum, omnibus aliis hæredibus ſuis a ſucceſſione* "*penitus excluſis, quia hoc voluit donator.*"

§ 3. The idea of theſe limited donations was evidently derived from the *Feudum Talliatum*, which is thus deſcribed by Du Cange:—"*Feudum Talliatum* "*dicitur verbis forenſibus, hæreditas in quamdam cer-* "*titudinem*

Du Cange Gloſſ. voce feodum.

" *titudinem limitata, ſeu feudum certis conditionibus con-*
" *ceſſum. Verbi gratia, alicui et liberis ex legitimo*
" *matrimonio naſcituris. Unde ſi is cui feudum datum eſt,*
" *moriatur abſque liberis, feudum ad donatorem redit.*
" *Talliare enim eſt ad quamdam certitudinem ponere, vel*
" *ad quoddam certam hæreditamentum limitare.*"

§ 4. Theſe limited donations were probably introduced into practice about the end of the reign of *Hen.* II. or that of one of his ſons, in order to prevent the donees of ſuch eſtates from alienating them, as they could have done if the limitation had been to them and their heirs in general. This opinion ſeems to be confirmed by the obſervation, that in *Glanville*, who gives a very accurate account of the different kinds of eſtates that were known in his time, no mention whatever is made of a limited donation; whereas we have ſeen that *Bracton*, who wrote in the reign of *Hen.* III. gives a very correct deſcription of them.

Fleta, lib. iii. c. 9. Britton c. 36.

§ 5. The general propenſity which prevailed about the time of *Edward* I., to favour a liberty of alienation, induced the judges to conſtrue limitations of this kind in a very liberal manner. Inſtead of declaring that theſe eſtates muſt deſcend to thoſe heirs who were particularly deſcribed in the grant, according to the evident intention of the donors, and the ſtrict principles of the feudal law (*b*), and that the donees

(*b*) Jus feudale non ſolum talliis non adverſari, ſed maxime eis favere conſtat; non ſolum quod nullas fœminas ad ſucceſſionem admittet,

donees of ſuch eſtates ſhould not, in any caſe, be enabled by their alienation, to defeat the ſucceſſion of thoſe who were mentioned in the gift, or the donor's right of reverter; they had recourſe to an ingenious device, taken from the nature of a condition. Now, it is a maxim of the common law, that when a condition is once performed, it is thenceforth entirely gone, and the thing to which it was before annexed, becomes abſolute and wholly unconditional.

Plowd. 241.

The judges, reaſoning upon this ground, determined, that thoſe eſtates were conditional fees; that is, were granted to a man and the heirs of his body, upon condition that he had ſuch heirs. And, therefore, as ſoon as the donee of an eſtate of this kind had iſſue born, his eſtate became abſolute by the performance of the condition; at leaſt for theſe three purpoſes. 1ſt, To enable him to alien the land, and thereby to bar not only his own iſſue, but alſo, the donor of his right of reverter. 2d, To ſubject him to forfeit the eſtate for treaſon, which, until iſſue born, he could not do for any longer term than that of his own life; leaſt the right of inheritance of the iſſue, and that of reverter of the donor, might be thereby defeated. 3d, To enable him to charge the lands with rents and other incumbrances, ſo as to bind the iſſue.

1 Inſt. 19 *a.*
2 Inſt. 333.
7 Rep. 34 *b.*

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mittet, ſed multo magis, quod tenorem conceſſionis ſemper ſervandum jubeat, hæreditatemque ſecundum eam deferendam expreſſé jubeat. Craig. De Jure Feud. lib ii. tit. 16. ſ. 3.

§ 6. The

§ 6. The donee of a conditional fee might alſo alien the lands before iſſue had; nor could the donor have entered in ſuch a caſe, becauſe that would have been contrary to his own donation, which limited the lands to the donee and his iſſue. And if the donee had iſſue born after the alienation, the donor was excluded during the exiſtence of ſuch iſſue: and the iſſue were alſo bound by the alienation of their anceſtor, though previous to their birth, becauſe they could only claim in the character of his repreſentatives, and were therefore bound by his acts. But where the donee of a conditional fee aliened before iſſue, ſuch alienation did not bar the donor's right of reverter, whenever there happened a failure of iſſue; becauſe the ſubſequent birth of iſſue was not a ſufficient performance of the condition, to make the precedent alienation valid. Id.

§ 7. Where the perſon to whom a conditional fee was limited had iſſue, and ſuffered it to deſcend to ſuch iſſue, they might alien it; becauſe, having ſucceeded by deſcent to the eſtate of their anceſtor, who had acquired a power of alienation by having iſſue, they took the eſtate in the ſame manner, diſcharged from any reſtraint whatever. But if the iſſue did not alien, the donor would ſtill be entitled to his right of reverter; as the eſtate would have continued ſubject to the limitations contained in the original donation. 7 Rep. 34 *b*. 35 *a*.

§ 8. From this mode of conſtruing conditional fees, the purpoſes for which they were intended were fruſtrated; and therefore, the nobility, whoſe object it was to perpetuate their poſſeſſions in their own families, procured the Of the Statute De Donis.

the ſtatute of *Weſtminſter*, 2d 13th *Edward* I. to be made, which, after reciting the right of alienation aſſumed by the donors of the conditional fees, proceeds thus:—" *Dominus rex ſtatuit quod voluntas donatoris* " *ſecundum formam in charta doni ſui manifeſté expreſſam* " *de cæteris obſervetur, ita quod non habeant illi quibus* " *tenementum ſic fuit datum ſub conditione, poteſtatem* " *alienandi tenementum ſic datum, quo minus ad exitum* " *illorum quibus tenementum ſic fuerit datum remaneat,* " *poſt eorum obitum; vel ad donatorem, vel ad ejus* " *hæredem (ſi exitus deficiat) revertatur.*

1 Burr. R. 115. § 9. This ſtatute, as Lord *Mansfield* juſtly obſerves, has only repeated what the law of tenures ſaid before, that the tenor of the grant ſhould be obſerved.

2 Inſt. 335. And, therefore, the judges, in the conſtruction of it, determined, that where an eſtate was limited to a man and the heirs of his body, the donee ſhould not in future have a conditional fee, but divided the eſtates, and created a particular eſtate in the donee, ſubject to which, the reverſion remained in the donor.

§ 10. In conſequence of this conſtruction, eſtates limited in this manner are not conditional; nor is the right of entry of the donor, on failure of iſſue of the donee, conſidered as ariſing from a breach of the condition, but as a right accruing to the donor on the natural expiration of the eſtate granted. The ſtatute rejects the erroneous opinion which had been held by the judges, that a donation of this kind created a conditional fee, and declares, that it veſts an eſtate of inheritance in the donee, and ſome particular heirs of

his, to whom it muſt deſcend; and that the eſtate of the donor is a reverſion expectant on that eſtate.

§ 11. The ſtatute *De Donis* was made in the reign of a prince, who, from the great number and excellence of his laws, has juſtly acquired the title of the *Engliſh Juſtinian.* It is, therefore, highly probable that he was induced by ſome motives, unknown to modern times, to give his aſſent to a law, which by allowing the nobility to intail their eſtates, made it impoſſible to diminiſh the property of the great families, and, at the ſame time, left them all means of increaſe and acquiſition. 1 Inſt. 392 *b.*

§ 12. An eſtate tail may be deſcribed to be an eſtate of inheritance created by the ſtatute *De donis conditionalibus*, which is deſcendible to ſome particular heirs only of the perſon to whom it is granted, and not to his heirs general. It is called an *Eſtate Tail*, or a *Fee Tail*, from its ſimilarity to the *feodum talliatum*, which appears to have been well known at that time, as it is mentioned in the 46th chapter of this ſtatute; and by which the feudal writers meant any mutilated or truncated inheritance, from which the heirs general were excluded. Deſcription of an Eſtate Tail. Lit. ſ. 13.

§ 13. *Littleton* ſays, that tenant in tail is in two manners: *Tenant in tail general*, and *Tenant in tail ſpecial.* Where lands are given to a man and the heirs of his body, without any farther reſtriction, it is an eſtate in tail general: becauſe, how often ſoever ſuch donee in tail be married, his iſſue, by every ſuch marriage, is capable of inheriting the eſtate tail. But if the gift is reſtrained Eſtates in Tail general and ſpecial. Lit. ſ. 13, 14, 15.

ſtrained to certain heirs of the donee's body, excluſive of others, as where lands are given to a man and the heirs of his body on *Mary* his preſent wife to be begotten, it is an eſtate in tail ſpecial, and the iſſue of the grantee by any other wife is excluded.

Eſtates in Tail Male and Female.

Lit. ſ. 21, 22.

§ 14. If lands are given to a perſon and the heirs male of his body, this is called an *Eſtate in Tail Male*, to which the heirs female are not inheritable. On the other ſide, if lands are given to a man and the heirs female of his body, this is called an *Eſtate in Tail Female*, to which the heirs male of his body are not inheritable.

Aſherton v. Rooke, 3 Vin. Ab. 365.

1 Inſt. 25 *a.* n. 1.

Lit. ſ. 24.

§ 15. In all inſtances of ſpecial intails, which limit the lands to one particular claſs of heirs, no deſcendant of the donee can make himſelf inheritable to ſuch a gift, unleſs he can deduce his deſcent through that particular claſs of heirs, to which the ſucceſſion of the lands was firſt limited. Therefore if lands be given to a man and the heirs male of his body, and he has iſſue a daughter, who has iſſue a ſon; this ſon can never inherit the eſtate: for, being obliged to claim through the daughter, he muſt neceſſarily ſhew himſelf out of the words of the gift, which limited the lands to the heirs male only of the donee, which the daughter cannot be.

1 Inſt. 25 *b.*

§ 16. For the ſame reaſon, if lands be given to a man and the heirs male of his body, remainder to him and the heirs female of his body, and the donee has iſſue a ſon, who has iſſue a daughter, who has iſſue a ſon;

ſon; this ſon cannot inherit either of the eſtates, becauſe he cannot deduce his deſcent wholly, either through the male or the female line.

Eſtates in Frank Marriage.

§ 17. It was formerly a practice for a perſon to give lands to another, as a marriage portion, with his daughter or couſin, to hold to them in *Frank Marriage*, by which they became deſcendible to the iſſue of ſuch marriage. Thus *Glanville* ſays:—"*Liberum dicitur maritagium* "*quando aliquis liber homo, aliquam partem terræ ſuæ* "*dat cum aliqua muliere, alicui in maritagium.*

Lit. ſ. 17.

Lib. vii. c. 18.

1 Inſt. 21 *a.*

§ 18. The judges had conſtrued gifts in frank marriage in the ſame manner as donations to perſons and the heirs of their bodies, by which means they became conditional fees, and conſequently were alienable after iſſue had. But this conſtruction being evidently contrary to the intention of the perſons who had created ſuch eſtates, the ſtatute *De donis conditionalibus*, after reciting the caſe of a gift in frank marriage, compriſes it in the remedial part of that law; by which means gifts of this kind became eſtates in tail ſpecial; and the donees were reſtrained from alienation.

2 Inſt. 334.

Modes of creating an Eſtate Tail.

§ 19. The ſtatute *De donis* ſpeaks only of three modes of creating an eſtate tail; namely, a gift to a man and his wife and to the heirs of their bodies, a gift in frank marriage, and a gift to a perſon and the heirs of his body iſſuing; yet if lands be given to a perſon and his heirs, and if the donee dies without heirs of his body, that it ſhall remain to another, this ſhall be an eſtate tail by the equity of the ſtatute, although it be out of

1 Inſt. 23 *a.* 2 Inſt. 334. Plowd. 53. 251.

the words. For the makers of the act did not mean to enumerate all the forms of eſtates tail, but to put theſe as examples; ſo as all manner of eſtates tail, general or ſpecial, are within the purview of the act. At common law, the intent of the donor was infringed and eluded, which was contrary to right and good conſcience, and therefore the ſtatute being made to reſtrain that vicious liberty of breaking ſuch intents, which was ſuffered by the common law, ſhall be extended by equity.

What may be intailed. 1 Inſt. 19 *b.*

§ 20. With reſpect to the kind of property that was meant as the object on which the ſtatute *De donis* was to operate, the only word in the ſtatute itſelf is *Tenementum*, which has been ſtated to ſignify every thing that may be holden, provided it be of a permanent nature; ſo that not only lands may be intailed, but alſo rents, commons, and all other profits ariſing from lands.

Tit. i. ſ. 1.

§ 21. A truſt eſtate may be intailed, as will be ſhewn under Title xii.; and a copyhold may alſo in ſome caſes be intailed, as will appear under Title x.

1 Inſt. 20 *a.* n. 5.

§ 22. Mr. *Hargrave* obſerves, that "two things "ſeem eſſential to an intail within the ſtatute *De donis:* "One, that the ſubject be land, or ſome other thing "of a real nature; the other, that the eſtate in it be "an eſtate of inheritance." It is not, however, neceſſary that the thing to be intailed ſhould iſſue out of lands; for if it is annexed to lands, or in any wiſe concerns lands, or relates to them, it may be intailed.

1 Inſt. 20 *a.*

§ 23. It

Tit. i.

§ 23. It has been ſtated, that money directed to be laid out in the purchaſe of land, is conſidered in equity as land. In ſuch a caſe, if the land to be purchaſed is directed to be conveyed to a perſon in tail, he will be conſidered as tenant in tail of the money, until the purchaſe is made.

§ 24. As to inheritances merely perſonal, which neither iſſue out of land, nor relate to land, or ſome certain place, and which are not demandable *ut tenementa*, in a *præcipe*, they cannot be intailed within the ſtatute *De donis*. So that when things of this nature are limited to a perſon and the heirs of his body, the donee takes a conditional fee, and may diſpoſe of the property, as ſoon as he has iſſue.

1 Inſt. 20 *a*.

§ 25. An annuity, which only charges the perſon of the grantor, and not his lands, though it may be granted in fee, yet cannot be intailed. And in a modern caſe, Lord *Hardwicke* held, that an annuity in fee ſimple, granted by the crown out of the four and a half *per cent.* duties, payable for imports and exports at the iſland of *Barbadoes*, was merely a perſonal inheritance, and not intailable within the ſtatute *De donis*: and, therefore, that being ſettled upon *A.* and the heirs of his body, it was a conditional fee at common law; and *A.* having iſſue, might bar the poſſibility of reverter.

1 Inſt. 20 *a*.

Stafford v. Buckley, 2 Veſ. 170.

Mr. *Hargrave*, in his notes on the firſt Inſtitute, mentions a manuſcript account of this caſe, in which Lord *Hardwicke* is reported to have ſaid, that

1 Inſt. 20 *a*. n. 4. Vide Turner v. Turner, Amb. 776.

Holderneſſe v. Carmarthen, 1 Bro. R. 377.

an annuity, granted out of the revenues of the poſt or exciſe office, favours no more of the realty than money.

Who may be Tenants in Tail.

§ 26. All natural perſons, capable of holding an eſtate of inheritance in lands, may be tenants in tail; and it was determined in 4 *Eliz.* that the king was within the ſtatute *De donis*, as well as a common perſon; becauſe this ſtatute was made to remedy the error which had crept into the law, that the donee had the power of aliening an eſtate given to him and the heirs of his body, after iſſue had; and to reſtore the common law, in this point, to its right and juſt courſe; which it did, by reſtoring to the donor the obſervance of his intent.

Willion v. Berkeley, Plowd. 227. 7 Rep. 32 *a.*

Tenant in Tail holds of the Donor.

§ 27. We have ſeen that in conſequence of the ſtatute of *Quia emptores terrarum*, where a perſon conveys away his whole eſtate, he cannot reſerve any tenure to himſelf: but this ſtatute only extends to thoſe caſes where the fee ſimple is transferred; and, therefore, where a tenant in fee ſimple grants an eſtate tail out of it, the tenant in tail ſhall hold of the donor, and not of the chief lord.

1 Inſt. 23 *a.* 2 Inſt. 505. Plowd. 237.

2 Rep. 92 *a.*

§ 28. If the donor of an eſtate tail grants his reverſion to a ſtranger, the donee ſhall hold of ſuch ſtranger. But if lands be given to *A.* in tail, with remainder over in fee to a ſtranger, the donee of the eſtate tail ſhall hold of the chief lord becauſe the whole eſtate is conveyed away.

2 Inſt. 505. Dyer, 362 *b.* pl. 19.

§ 29. Where

§ 29. Where the tenant in tail has alſo the reverſion in fee, as he cannot hold of himſelf, it being a maxim of law that *nemo poteſt eſſe tenens et dominus*, he ſhall hold of the ſuperior lord. 2 Rep. 92 *b.*

§ 30. Eſtates tail, like all other eſtates, have certain incidents annexed to them, which cannot be reſtrained by any proviſo or condition whatever: and if ſuch proviſo be inſerted in a gift of an eſtate tail, it is void. Incidents to Eſtates Tail.

§ 31. The firſt incident to an eſtate tail is that the tenant ſhall not be puniſhed for committing waſte: by felling timber, pulling down houſes, opening and working mines, &c. But this power muſt be exerciſed during the life of the tenant in tail, for at the inſtant of his death it ceaſes. If, therefore, a tenant in tail ſells trees growing on the land, the vendee muſt cut them down during the life of the tenant in tail; for, otherwiſe, they will deſcend to the heir, as parcel of the inheritance. Power to commit Waſte. 11 Rep. 50 *a.* Plowd. 259. Hard. R. 96.

§ 32. It is ſaid by *Clark* Juſt. in 27 *Eliz.* that if tenant in tail grants all his eſtate, the grantee is diſpuniſhable for waſte. So if the grantee grants it over, his grantee is alſo diſpuniſhable. 3 Leon. R. 121.

§ 33. The Court of Chancery will not, in any caſe whatever, reſtrain a tenant in tail from committing waſte.

Thus, Lord Chancellor *Talbot* is reported to have ſaid, that in Mr. *Saville*'s caſe, who, being an infant, Forreſter's Rep. 16.

and tenant in tail in poſſeſſion, in a very bad ſtate of health, and not likely to live to full age; his guardian cut down a great quantity of timber, juſt before his death. The remainder-man applied for an injunction to reſtrain him, but could not prevail.

Subject to Dower and Curteſy.

§ 34. Eſtates tail are ſubject to dower and curteſy, as will be ſhewn under thoſe titles.

Barrable by Recovery.

Vide Tit. 36.

§ 35. Another incident inſeparably annexed to an eſtate tail is, that the tenant may ſuffer a common recovery.

Not ſubject to merger.

§ 36. We have ſeen, that whenever a greater eſtate and a leſs coincide, and meet in one perſon without any intermediate eſtate, the leſſer eſtate is immediately annihilated or merged in the greater. In conſequence of this principle, if an eſtate had been given, before the ſtatute *De donis*, to *A.* and the heirs of his body, it would have merged in the fee-ſimple, if ſuch fee-ſimple was then veſted in *A.*, or if it was limited to him by the ſame conveyance; or came to him afterwards. But it was determined by the judges, in the reign of *Edw.* 3. that an eſtate tail cannot be merged or ſurrendered or extinguiſhed by the acceſſion of a greater eſtate. So that a man may have in his own right, and at the ſame time, both an eſtate tail, and the immediate reverſion in fee-ſimple, in the ſame land.

2 Rep. 61 *a.* Plowd. 296. 27 Aſſ. 60.

§ 37. The reaſon of this determination was becauſe the object of the ſtatute *De donis* was to render eſtates tail unalienable: now, if they were allowed to merge

in the fee-ſimple, an obvious mode of deſtroying them might have been adopted, by the tenant in tail purchaſing the reverſion.

§ 38. A tenant in tail, having only a particular eſtate, and not the entire property, he is not bound to pay any charges or incumbrances affecting the eſtate. And it was formerly held, that he was not even bound to keep down the intereſt of ſuch charges and incumbrances: but it has ſince been held, that, in ſome caſes, a tenant in tail is bound to pay intereſt.

Tenant in Tail not bound to pay off Incumbrances.

Vide Tit. 15.

§ 39. Where a tenant in tail does pay off an incumbrance charged on the fee-ſimple, the preſumption is, that ſuch payment was made in exoneration of the eſtate. But the tenant in tail may, in a caſe of this kind, by taking an aſſignment of the incumbrance to a truſtee for himſelf, or by ſeveral other acts, charge the eſtate with the payment of ſuch incumbrance.

2 P. Wms. 604. 1 Bro. R. 206. 218.

§ 40. The Earl of *Shrewſbury*, being tenant in tail, under an act of parliament, which reſtrained him from alienation, ſubject to a charge of 15,000 *l.* for his ſiſters portions, ſecured by a term of ninety-nine years, paid off the portions out of his own money without taking any aſſignment of the term, or any declaration of truſt of it for himſelf. In 1751, Lord *S.* by deed, reciting that he was ſeiſed of the freehold ſubject to this charge, and that he had paid off the portion of one of his ſiſters, and part of the portion of another, and that as none of theſe portions had been raiſed under the term of ninety-nine years, he had a right to have them

Shrewſbury v. Shrewſbury, 1 Veſ. jun. 227.

raiſed for himſelf: he, in conſideration of 1000 *l.*, conveyed an advowſon, being part of the premiſes compriſed in the term, to one *Robinſon*, and the truſtees conſented and were parties upon condition that the conſideration ſhould go in diſcharge of the portions. Lord *S.* died in 1787, leaving a will, but without taking any notice of his right to be reimburſed this ſum, or doing any other act by which his intention could be known.

The bill was brought by his perſonal repreſentative againſt the next tenant in tail, and the truſtees of the term praying that they might be compelled to raiſe ſuch ſums as were paid by the late Earl to his ſiſters. Lord *Thurlow* obſerved, that in the tranſaction of 1751 there was a perfect and diſtinct recognition, that the circumſtance of paying off the charge did make Lord *S.* a creditor, and decreed for the plaintiff.

Has a right to the title deeds.

Papillon v. Voice, 2 P. Wms. 471.

§ 41. Tenant in tail, having an eſtate of inheritance, has a right to all title deeds and muniments belonging to the lands; and the Court of Chancery will order them to be delivered to him.

TITLE II.

ESTATE TAIL.

CHAP. II.

Of the Power of Tenant in Tail over his Eſtate, and the Modes of barring it.

§ 1. *Can only alien for his own Life.*
4. *The Iſſue not bound by his Anceſtors Acts.*
11. *Unleſs he confirms them.*
13. *Alienations by Tenant in Tail not ipſo facto void.*
14. *Sometimes a Diſcontinuance.*
15. *Sometimes voidable by Entry.*
17. *Of Baſe Fees.*
18. *Tenant in Tail cannot create an Eſtate to commence after his own Death.*
21. *Exception.*
23. *The Iſſue not ſubject to Incumbrances.*
24. *Except Debts due to the King.*
§ 26. *A Tenant in Tail may make Leaſes.*
27. *Subject to the Bankrupt Laws.*
29. *And to Forfeiture for Treaſon.*
31. *But not for Felony.*
32. *Modes of Barring Eſtates Tail.*
35. *Warranty.*
37. *Common Recovery.*
38. *Fine.*
44. *Which cannot be reſtrained.*
47. *Appointment to a charitable Uſe.*
48. *How the Intail of Money to be laid out in Lands may be barred.*

Section 1.

THE ſtatute *De donis conditionalibus* affecting a perpetuity, reſtrains the tenant in tail from alienating or incumbring his eſtate in any mode whatever, for a greater term than that of his own life. So that all conveyances, charges, and incumbrances, made by a tenant in tail, become abſolutely void, or at leaſt voidable by his death; and do not affect or bind his iſſue, or the perſons intitled to the remainder or reverſion.

Can only alien for his own Life.

Lit. ſ. 613.

§ 2. It

§ 2. It is obſervable, that the words of the ſtatute *De donis*, by which the alienation of an eſtate tail is prohibited, only extend to the original donee, and not to his iſſue :—*Nec habeant illi quibus tenementum ſic fuerit datum, poteſtatem alienandi.* But ſtill this prohibition was extended by the judges to the iſſue of the donee in *infinitum*. And *Broke* ſays, the omiſſion of the heirs of the donee in the ſtatute, was a miſpriſion of the clerk. Lord *Coke*, in his comment on this ſtatute, ſays, " It was adjudged by *Beresford*, that the " iſſues in tail ſhould not alien, no more than they to " whom the land was given, and that was the intent of " the makers of the act, and it was but their negligence " that it was omitted, as there it is ſaid. In this caſe, " by way of purchaſe, the land is given to the donees, " and by way of limitation to the iſſues in tail; and, " therefore, by a benign interpretation, the purview of " this extends to the iſſues in tail.

Plowd. 13. T. Jones, 239.

Bro. Ab. Tit. Parliam. 91.

2 Inſt. 336.

§ 3. Where a tenant in tail makes a conveyance in fee for a valuable conſideration, the Court of Chancery will decree him to make a good title. But Mr. Juſtice *Wright* is reported to have ſaid, that the Court will not point out what title the tenant in tail ſhall make; but will decree him to make ſuch title as he is capable of doing. If, however, the tenant in tail refuſes to obey the decree, the eſtate tail will deſcend to his iſſue.

Sutton v. Stone, 2 Atk. 101.

2 Veſey, 634.

§ 4. The iſſue in tail is not bound, either at law or in equity, to complete any contract or agreement, made by his anceſtor, reſpecting the eſtate tail; becauſe the iſſue

The iſſue not bound by his Anceſtors Acts.

iſſue claims *per formam doni* from the perſon by whom the eſtate tail was originally created, and not from the immediate anceſtor. If, therefore, a tenant in tail mortgages his eſtate, or contracts for an abſolute ſale of it, and dies before he has done thoſe acts by which an eſtate tail may be barred; a court of equity will not compel the iſſue in tail to complete the contract. Hob. 203. 1 P. Wms. 720. 10 Mod. 469. 2 Veſ. 634.

§ 5. Tenant in tail granted rent, and died; the iſſue paid the rent, and made a feoffment of the land, and re-took in fee, yet he ſhall hold diſcharged, for the rent was void by the death of the grantor, and the payment of the heir will not make it good. Contrary of a leaſe by the tenant in tail, where the iſſue accepts rent, for the leaſe was only voidable. Bro. Ab. Tit. Grant. 145.

§ 6. A tenant in tail made a mortgage without levying a fine, and entered into a covenant for farther aſſurance, and died. Lord Keeper *Bridgeman* would not compel the iſſue to make the aſſurance good, though the father might have done it, by ſuffering a recovery. Jenkins v. Keymis, 1 Lev. 237.

§ 7. A tenant in tail entered into articles concerning his lands, for payment of debts, but died without doing any act to deſtroy the eſtate tail. It was decreed that this agreement could not be executed againſt the heir in tail. Herbert v. Tream, 2 Ab. Eq. 28.

§ 8. It was formerly held, that a covenant by a tenant in tail to levy a fine upon a valuable conſideration, and a decree that he ſhould do ſo, would bind the Hill v. Carr, 1 Cha. Ca. 294.

the iſſue in tail. But this doctrine was ſoon altered,
2 Vent. 350. and it was fully determined, that a court of equity cannot diſpenſe with any of thoſe forms which the law requires to bar eſtates tail.

Sangon v. Williams, Gilb. Rep. 164. Weale v. Lower, 2 Vern. 306. S. P.

§ 9. A decree was obtained againſt a tenant in tail, who had contracted for the ſale of his eſtate tail, and received a great part of the conſideration, to compel him to levy a fine and ſuffer a recovery. The tenant in tail ſtood out all proceſs againſt him, to a contempt, and died. A bill was then brought againſt his iſſue to revive the decree againſt him, but it was diſmiſſed.

Wharton v. Wharton, 2 Vern. 3. Id. 380.

§ 10. Where a tenant in tail covenanted to ſettle a jointure, and in order to perform his covenant acknowledged a fine, but died before it was perfected; the Court of Chancery refuſed to ſupply this defect againſt the iſſue.

Unleſs he confirms them.

§ 11. But if the iſſue in tail does any act towards carrying the agreement or contract of his anceſtor into execution, or ſhews his aſſent to it, in any way; it will then become binding on him, and he will be compelled to perform it, in equity.

Roſs v. Roſs, 1 Cha. Ca. 171.

§ 12. *Francis Roſs* had iſſue *James* his legitimate ſon, and *John* a baſtard ſon, and deviſed lands to his baſtard ſon in tail; his legitimate ſon having copyhold lands by deſcent.

James and *John* agreed to exchange their eſtates, and the agreement being executed, *James* obtained a decree

a decree againſt *John*, to levy a fine of his eſtate tail, and, by that means, to ſettle it on *James*. *John* died in contempt for not obeying the decree: his iſſue entered on the copyhold eſtate, and continued in the enjoyment of it; in conſequence of which a bill was filed againſt him by *James*, to perform the agreement made by his father.

It was reſolved, that if a tenant in tail agrees to convey, he is bound by that agreement: that if he dies without performing it, his iſſue is not bound to perform it: but that if the iſſue accepts of that agreement, and enters, as in this caſe, on the lands; it then becomes his own agreement, and will bind him.

Alienations by Tenant in Tail, not ipſo facto void.

2 Ld. Raym. 779.

§ 13. It has been obſerved, that the ſtatute *De donis* reſtrains the tenant in tail from alienating his eſtate for any longer term than that of his own life. But this muſt not be underſtood literally, that the grantee has only an eſtate for the life of the tenant in tail, which determines *ipſo facto* by the death of the tenant in tail: all that is meant by it is, that his eſtate is certain and indefeaſible, no longer than during the life of the tenant in tail, upon whoſe death it is defeaſible by his iſſue.

Sometimes a Diſcontinuance.

1 Inſt. 327 *b*. Gilb. Ten. 116.

§ 14. The law conſiders the tenant in tail as the perſon who has not only the poſſeſſion, but alſo the right of poſſeſſion and inheritance in him; and, therefore, he is allowed to alienate them by certain modes of conveyance, ſo as to take away the entry of the iſſue in tail, and drive him to his action, which is called a diſcon-

2 Inſt. 335. diſcontinuance. For, as Lord *Coke* ſays, "ſeeing he "had an eſtate of inheritance, the judges compared "it to the caſe where a man was ſeiſed in right of his "wife, or a biſhop in right of his biſhopric, or an "abbot in right of his monaſtery." But it is a rule of law, that in order to work a diſcontinuance of an eſtate tail, it is neceſſary that the perſon diſcontinuing ſhould be actually ſeiſed by force of the intail.

1 H. Black. Rep. 269.

Sometimes voidable by Entry.

Seymour's caſe, 10 Rep. 95. 2 Ld. Raym. 779. 782.

§ 15. It has been determined, upon the ſame principle, that a tenant in tail may alienate his eſtate by other modes of conveyance which only transfer the poſſeſſion, not the right of poſſeſſion; and that ſuch alienations do not become *ipſo facto* void by the death of the tenant in tail, but muſt be avoided by the entry of the iſſue in tail.

1 Inſt. 51 *a.*

§ 16. If a tenant in tail exchanges with a tenant in fee-ſimple, it will be good until it is avoided by the entry of the iſſue of tenant in tail.

Of Baſe Fees.

10 Rep. 96 *a.* Plowd. 557.

§ 17. In all caſes of alienation by a tenant in tail, the alienee has an eſtate of inheritance deſcendible to him and his heirs, as long as the tenant in tail has heirs of his body, which is a baſe fee. In many caſes this eſtate may be avoided after the death of the tenant in tail by the action or entry of the iſſue in tail; and in ſome, both the action and entry of the iſſue in tail is taken away. But until a baſe fee is determined, it has all the incidents of an eſtate in fee-ſimple.

§ 18. Where

§ 18. Where a tenant in tail creates an eſtate to commence after his own death, it is abſolutely void; and he continues to be tenant in tail as before. Becauſe there the iſſue in tail has a right paramount *per formam doni.*

Tenant in Tail cannot create an Eſtate to commence after his own Death.

§ 19. Tenant in tail covenanted to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon and his heirs: it was reſolved, that the ſon ſhould not have the land by this covenant. For when tenant in tail covenanted to ſtand ſeiſed to the uſe of himſelf for life, this was as much as he could lawfully do; and the limitation over was void, ſo that he was ſeiſed as before.

Bedingfield's caſe, Cro. Eliz. 895. 2 Rep. 52 *a.*

§ 20. Tenant in tail covenanted, in conſideration of natural love and affection, to ſtand ſeiſed of the lands in queſtion to the uſe of himſelf for life, remainder to his eldeſt ſon in tail, &c. The queſtion was, whether the tenant in tail had made any alteration of the eſtate tail, by this covenant to ſtand ſeiſed.

Machell v. Clarke, 2 Ld. Ray. 778. Salk. 619. 7 Mod. 18. 11 Mod. 19.

It was determined, that the covenant to ſtand ſeiſed did not alter the eſtate tail; for the uſes did not take effect during the life of the tenant in tail, but were to veſt after his death, and ſo ſignified nothing, becauſe the title of the heir in tail, which is paramount, veſts immediately. And Lord *Holt* obſerved, that the caſe put by *Littleton*, f. 613. muſt be underſtood to mean, that the iſſue in tail muſt avoid the conveyance of his anceſtor; and that the caſe of *Took* v. *Glaſcock* was not law.

7 Mod. 26.

1 Saund. R. 260.

§ 21. It

Exception.

§ 21. It was, however, laid down, in the above caſe, that an eſtate granted by a tenant in tail, which muſt, or by poſſibility, may commence in the life of the tenant in tail, is good.

2 Ld. Ray. 782. 7 Mod. 27.

Thus, if a tenant in tail covenants to ſtand ſeiſed to the uſe of the covenantee for life, remainder to *J. B.* in fee, or to the uſe of *J. F.* for life, remainder to *J. N.* in fee, the remainder is good, until it is avoided by the entry of the iſſue in tail, although the tenant in tail ſhould die before the remainder took effect; becauſe the eſtate for life takes effect immediately, and the remainder might, by poſſibility, have taken effect in the lifetime of the tenant in tail.

Idem.

§ 22. So, if a tenant in tail conveys, by leaſe and releaſe, to *J. S.* in fee, to the uſe of himſelf for life, remainder to *J. N.* in fee, this remainder is good in its creation, though it is to commence after the death of the tenant in tail; becauſe it ariſes out of the eſtate of the releaſee, which eſtate would have been good, till avoided by the entry of the iſſue in tail.

Vide Doe v. Rivers, 7 Term R. 276.

The Iſſue not ſubject to Incumbrances.

§ 23. The iſſue in tail are not ſubject to any of the debts or incumbrances of their anceſtors; and, therefore, if a tenant in tail acknowledges a ſtatute or recognizance, upon which the land entailed is extended, the iſſue in tail may enter upon the death of the anceſtor, and ouſt the creditor.

Bro. ab. Tit. Recog. p. 7.

Except Debts due to the King.

§ 24. By the ſtatute 33 *Hen.* 8, c. 39, § 75, it is enacted, that all manors, &c. which then were, or thereafter

thereafter ſhould come in or to the hands of any perſon or perſons to whom the ſame had or ſhould deſcend in fee-ſimple, or in fee-tail, general or ſpecial, by, from, or after the death of his or their anceſtors, which ſaid anceſtor or anceſtors was or ſhould be indebted to the king by judgment, recognizance, obligation, or other ſpecialty, then, and in every ſuch caſe, the ſame manors, &c. ſhould be and ſtand charged and chargeable to and for the payment of the ſame debt.

§ 25. It was reſolved in the Exchequer, in 41 *Eliz.* 1ſt. That before this ſtatute, if tenant in tail of land became indebted to the king, by judgment, recognizance, obligation, or otherwiſe, and died, the king ſhould not extend the land in the ſeiſin of the iſſue in tail; for the king is bound by the ſtatute *de Donis.* 2dly, That if tenant in tail becomes indebted to the king, by the receipt of the king's money, or otherwiſe, unleſs it be by judgment, recognizance, obligation, or other ſpecialty, and dies, the land in the ſeiſin of the iſſue in tail ſhall not be extended for ſuch debt, for the ſtatute only extends to the ſaid four caſes; and all other debts remain at common law. 3dly, That if tenant in tail becomes indebted to the king by one of the four ways mentioned in the ſaid act, and dies, and before any proceſs or extent, the iſſue in tail *bonâ fide* aliens the land in tail, the lands ſhall not be extended by force of the ſaid act, in the hands of the alienee. 4th, That a debt originally due to a ſubject, to which the king afterwards becomes entitled, by attainder, outlawry, forfeiture, gift of the party, or any other collateral way, is not within the act, which only ex-

Anderſon's Caſe, 7 Rep. 21.

tends to debts originally due to the king, by judgment, recognizance, obligation, or other ſpecialty.

Tenant in Tail may make Leaſes.

§ 26. In conformity to the principle, that a tenant in tail can only alien or charge his eſtate for his own life, all leaſes made by tenants in tail might be avoided at their death. But now, by the ſtatute 32 *Hen.* 8. c. 28., tenants in tail are enabled to make leaſes for three lives or twenty-one years, which ſhall bind their iſſue; but not the perſons in remainder or reverſion.

Vide Tit. 32.

Subject to the Bankrupt Laws.

§ 27. By the ſtatute 21 *Jac.* 1. c. 19. § 12., the commiſſioners of bankrupts are enabled to convey any manors or hereditaments whereof any bankrupt is ſeiſed of any eſtate tail in poſſeſſion, reverſion, or remainder, and whereof no reverſion or remainder is in the king of the gift or proviſion of his majeſty. And it is further provided, that all ſuch conveyances ſhall be good againſt the ſaid bankrupts and the iſſue of their body, and againſt all perſons whatever, whom the ſaid bankrupts, by common recovery, or other way or means, might cut off or debar from any remainder, reverſion, rent, profit, title, or poſſibility in, to, or out of the ſaid manors, &c.

§ 28. Where a bankrupt is tenant in tail in poſſeſſion, the commiſſioners of bankrupts are enabled, by this ſtatute, to convey the fee-ſimple of the lands. But where a bankrupt is tenant in tail in remainder, expectant on ſome preceding eſtate, the commiſſioners only acquire a baſe fee, determinable on failure of iſſue of the bankrupt: for the ſtatute only enables the commiſſioners to make

Fearne's Op. 83.

ſuch

ſuch a title as the bankrupt himſelf might have made. Now, as the bankrupt himſelf could not, without the concurrence of the perſon in poſſeſſion, by recovery or otherwiſe, bar the remainders, the commiſſioners cannot do it. But as the bankrupt might have levied a fine of the eſtate, which would have barred his own iſſue, and given the cognizee a baſe fee, therefore the commiſſioners acquire a baſe fee, that is, an eſtate in fee, as long as the bankrupt has heirs of his body.

Vide Tit. 36.

Vide Tit. 35.

§ 29. We have ſeen, that conditional fees were liable to forfeiture for high treaſon, as ſoon as the tenant had iſſue. But when the ſtatute *de Donis* was made, it was held, that eſtates tail were protected from forfeiture by that ſtatute; although this conſtruction was deemed, by ſome of the judges, to be rather too liberal and extenſive. Thus, *Hobart* ſays: "Judge whe- "ther the ſtatute of entails did not gain upon the "judges exemption from forfeiture for treaſon by ge- "neral and cunning words; for there is no word of "treaſon, nor word of any kind, but only, *non habeant* "*poteſtatem alienandi*; as if they had ſought only to "ſave eſtates tail from grants and ſales. For *Edward* "the 1ſt was too prudent and magnanimous a prince "to have given aſſent to a plain ſtatute, that the "eſtates, which were then ſubject to forfeiture for "treaſon, ſhould be exempted by a new name of "tail; being, in effect, the ſame eſtate that was "before."

And to Forfeiture for Treaſon.

1 Inſt. 392 *b.*

Hob. Rep. 340.

§ 30. This exemption from forfeiture not being agreeable to the rapacious and tyrannical principles of

Henry 8., he had addreſs enough to procure a ſtatute, 26 *Hen.* 8. c. 13., whereby all eſtates of inheritance, under which eſtates tail were covertly included, are declared to be forfeited to the king, upon conviction of high treaſon.

12 Rep. 6. Jenk. 286. Brown v. Waite, 2 Mod. 130.

No corruption of blood, however, takes place in this caſe.

But not for Felony.

§ 31. Eſtates tail are not, however, ſubject to forfeiture for felony, except during the life of the tenant in tail; the right of inheritance being preſerved to the iſſue, in this caſe, by the ſtatute *De donis.*

1 Inſt. 392 *b.*

Modes of barring Eſtates Tail.

§ 32. Eſtates tail had not exiſted a long time, before they were found to be productive of all thoſe inconveniencies which muſt ever attend property that is unalienable. Thus, Lord *Coke* ſays: "The true "policy of the common law was overturned by "the ſtatute *De donis conditionalibus*, 13 *Edward* 1., "which eſtabliſhed a general perpetuity by act of "parliament, for all thoſe who had or would have "it: by force whereof, all the poſſeſſions in *England*, "in effect, were intailed accordingly, which was the "occaſion and cauſe of the ſaid and divers other "miſchiefs: and the ſame was attempted and endea-"voured to be remedied at divers parliaments, and "divers bills were exhibited accordingly, (which I "have ſeen), but they were always, on one pretence "or other, rejected. But the truth was, that the "Lords and Commons, knowing that their eſtates "tail

6 Rep. 40 *b.*

" tail were not to be forfeited for felony or treaſon, " as their eſtates of inheritance were before the ſaid " act, (and chiefly in the time of *Henry* 3. in the " Barons war), and, finding that they were not an- " ſwerable for the debts or incumbrances of their an- " ceſtors, nor did the ſales, alienations, or leaſes of " their anceſtors, bind them for the lands which were " intailed to their anceſtors, they always rejected ſuch " bills."

§ 33. In 17 *Edward* 3., the Commons petitioned that the ſtatute of *Weſtminſter* the ſecond, be declared in what degree the iſſue in tail might alien; to which the king anſwered, that the law hitherto uſed in this caſe ſhould continue. Rot. Parl. vol. 2. p. 142.

§ 34. It being thus found impoſſible to obtain a legiſlative repeal of the ſtatute *De donis*, the judges adopted various modes of evading its effects, and of enabling tenants in tail to charge or alien their eſtates.

§ 35. The firſt of theſe was founded upon the idea of a recompence in value, in conſequence of which the judges, ſo early as in the reign of *Edward* 2. in expounding the ſtatute *De donis*, held, that where a tenant in tail aliened, and warranted the title, his heir ſhould be bound by ſuch warranty, if an eſtate of equal value deſcended to him; for this was in fact only exchanging one eſtate for another. They alſo held, that collateral warranty was not within the ſtatute Warranty. 2 Inſt. 335. 10 Rep. 37 *b.*

De donis, as that act was chiefly intended to prevent the tenant in tail from diſinheriting his own iſſue; and, therefore, collateral warranty, though without aſſets, was allowed to be a bar to an eſtate tail, and to all remainders and reverſions expectant thereon.

Vide Tit. 32.

§ 36. The rule that the iſſue in tail could not avoid the alienation of his anceſtor, provided he had a recompence in value, was ſtill farther extended by a deciſion of the judges in 44 *Edw.* 3. by which it was determined, that if tenant in tail granted a rent charge in conſideration of a releaſe of right, to a perſon who had a prior right to the eſtate; ſuch a grant ſhould bind the iſſue in tail, becauſe it was made for his benefit, and the eſtate tail deſcended to him as a recompence for ſuch grant.

Octavian Lumbard's Caſe, 44 Ed. 3. Year Book 21.

§ 37. In the reign of *Edward* 4. the celebrated caſe of *Taltarum* was brought into court, in which it was in effect determined, that a common recovery ſuffered by a tenant in tail, ſhould be an effectual bar to his iſſue and to the perſons claiming any eſtate in remainder or reverſion expectant on his eſtate tail.

Common Recovery. 12 Ed. 4. Year Book 14—19.

The principles on which this determination was founded will be explained in Title 36. Recoveries.

§ 38. Although a fine is a ſpecies of aſſurance which was well known before the ſtatute *De donis*, yet its efficacy in barring eſtates tail is of a much later date; for when the legiſlature paſſed the ſtatute *De donis*, they were ſo apprehenſive leaſt the extraordinary force which

Fine.

which the law annexed to a fine ſhould be applied to deſtroy eſtates tail, that they inſerted an expreſs clauſe in that ſtatute againſt the operation of a fine. *Et ſi finis ſuper hujuſmodi tenementum in poſterum levetur ipſo jure ſit nullus.*

§ 39. In the reign of *Henry* 7. whoſe object it was to give a power of alienation, in order to diminiſh the influence of the nobility, an act was paſſed, 4 *Hen.* 7. c. 24. which was ſuppoſed to enable tenants in tail to bar their iſſue by fine. And a caſe having ariſen in 19 *Hen.* 8. in which this point came into queſtion, a majority of the judges were of opinion, that a fine levied by a tenant in tail, according to the ſtatute 4 *Hen.* 7. was a good bar to the iſſue in tail. Dyer 3 *a.*

§ 40. This determination not having been entirely approved of, the ſtatute 32 *Hen.* 8. was made, by which it was declared, that all tenants in tail ſhould be enabled to bar their iſſue by fine: ſince which a fine duly levied, purſuant to the forms preſcribed by the ſtatute 4 *Hen.* 7. has been held to be a good bar to the iſſue in tail, though not to the perſons in remainder or reverſion. Vide Tit. 35.

§ 41. A tenant in tail may, therefore, by ſuffering a common recovery, acquire an eſtate in fee-ſimple, in the lands intailed. And, by levying a fine according to the forms preſcribed by the ſtatute 4 *Hen.* 7. he may acquire a baſe fee; that is, an eſtate deſcendible to him and his heirs general, as long as he has heirs of his body; and if he has the immediate reverſion in Idem.

fee in himſelf, his fine will then be a complete bar of the eſtate tail.

§ 42. There is, however, one ſpecies of eſtate tail which cannot, in conſequence of two ſtatutes made in the reign of *Henry* 8. be barred by fine, recovery, or any other means whatever; viz. an eſtate tail given or procured to be given by the crown as a reward for ſervices, where the remainder or reverſion is veſted in the crown.

Vide Tit. 36.

§ 43. Where a woman has an eſtate tail which was limited to her as a jointure, no recovery ſuffered by her, will, in conſequence of the ſtatute 11 *Hen.* 7. c. 20., operate ſo as to bar ſuch eſtate tail.

Idem.

§ 44. Soon after the introduction of fines and recoveries, attempts were made to reſtrain tenants in tail from barring their eſtates by thoſe aſſurances, which, if allowed, would ſoon have rendered fines and recoveries uſeleſs; as every perſon who created an intail would, of courſe, annex a condition of this kind to the grant. The judges, therefore, laid it down as a rule of law, that a tenant in tail cannot be reſtrained from levying a fine, or ſuffering a recovery, by any proviſo, condition, or covenant whatever.

Which cannot be reſtrained.
1 Inſt. 223 *b.* *n.* 1.

§ 45. Even a general proviſo reſtraining a tenant in tail from alienating, mortgaging, or incumbering, has been held to be void, as repugnant to the eſtate.

King v. Burchell, Amb. 379.

§ 46. The tenant in tail muſt, however, actually levy a fine, or ſuffer a recovery; for we have ſeen, that an agreement by a tenant in tail to levy a fine or ſuffer a recovery, and a decree to compel him to do it, will not bind his iſſue. 2 Veſ. 634.

§ 47. An appointment by a tenant in tail to a charitable uſe, has been held to be a good bar to an eſtate tail; becauſe the intention of the ſtatute 43 *Eliz.* of charitable uſes, was, to enable all perſons to make diſpoſitions of this kind, without the obſervance of any form or ceremony whatever; where the donor was of ſufficient capacity to diſpoſe, and had ſuch an eſtate as was in any way diſpoſable. Several reſtrictions have, however, by a modern ſtatute, been laid on diſpoſitions to charitable uſes, of which, an account will be given in a ſubſequent title. Appointment to a charitable Uſe. Attorney General v. Burdett, 2 Vern. 755. Vide Tit. 32.

§ 48. We have ſeen, that money agreed or directed to be laid out in the purchaſe of land, is conſidered, in equity, as land. In caſes of this kind, where the land was directed to be conveyed to a perſon in tail, it was a rule ſettled in Chancery, that wherever a fine, (which may be levied at any time), would have rendered the party abſolute owner of the land, he was entitled to receive the money immediately. But if a recovery (which can only be ſuffered in term), would have been neceſſary, there equity would direct the money to be actually laid out in the purchaſe of land, in order to give the perſons in remainder their chance of the firſt tenant in tail's dying before he could ſuffer a recovery. How the Intail of Money to be laid out in Lands may be barred. Edwards v. Warwick, 2 P. Wms. 171.

a recovery. But now, by the ſtatute 39 & 40 *Geo.* 3. c. 56., the Court of Chancery, on petition of the firſt tenant in tail, and of the party having any prior eſtate, (being adults, or, if feme coverts, ſeparately examined), may order ſuch money to be paid to them, or applied as they ſhall appoint.

TITLE III.

ESTATE FOR LIFE.

§ 1. *What conſtitutes an Eſtate for Life.*
3. *How created.*
9. *Tenants for Life hold of the Grantor.*
10. *Are entitled to Eſtovers.*
13. *But cannot commit Waſte.*
14. *Different Kinds of Waſte.*
15. *Felling Timber.*
24. *Pulling down Houſes.*
25. *Opening Pits or Mines.*
26. *Changing the Courſe of Huſbandry.*
29. *Deſtruction of Heir Looms.*
30. *Permiſſive Waſte.*
35. *Of the Action for Waſte.*
45. *Court of Equity.*
49. *The Timber belongs to the Perſon entitled to the Inheritance.*
57. *Of Waſte by Coporations Sole.*
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§ 61. *Of the Clauſe without Impeachment of Waſte.*
62. *Does not extend to malicious Waſte.*
69. *Is annexed to the Privity of Eſtate.*
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76. *Tenants for Life are entitled to Emblements.*
82. *Tenants for Life may pray in Aid.*
84. *Eſtates for Life are ſubject to Merger.*
86. *Are not intailable.*
87. *Subject to Payment of Intereſt.*
88. *But not Principal.*
89. *Of Occupancy.*
95. *Power of Tenant for Life over his Eſtate.*
97. *What Acts amount to a Forfeiture.*

Section 1.

AN eſtate for life, is a freehold intereſt in land; the duration of which is confined to the life or lives of ſome particular perſon or perſons; or to the happening, or not happening, of ſome uncertain event. What conſtitutes an Eſtate for Life.

§ 2. This eſtate is, in moſt reſpects, ſimilar to the *uſusfructus* of the civil law, which is thus defined by *Juſtinian*: "*Uſusfructus eſt jus alienis rebus utendi fruendi,* Inſt. Lib. 2. Tit. 4.

fruendi, ſalva rerum ſubſtantia." For the tenant for life has a right to the poſſeſſion and annual produce of the land, during his life, without having the *proprietas*, that is, the abſolute property and inheritance of the land itſelf, which is veſted in ſome other perſon.

How created. § 3. Eſtates for life are of two ſorts; either created by deed, or ſome other legal aſſurance; or elſe deriving their exiſtence from the operation of ſome principle of law.

Lit. ſ. 56. The firſt of theſe, which forms the ſubject of the preſent title, ariſes where lands are conveyed to a man for the term of his own life, or that of any other perſon, or for more lives than one; in all which caſes, he is called tenant for life; except where he holds during the life of another perſon, and then he is called tenant *pour auter vie.*

1 Inſt. 41 *b.* § 4. If lands are conveyed to a perſon for his own life, and that of *A.* and *B.*, the grantee has an eſtate of freehold, determinable on his own death, and the deaths of *A.* and *B:* nor can there be any merger of the freehold, during the lives of *A.* and *B.*, into the eſtate which the leſſee has for his own life: becauſe, though an eſtate for a man's own life is greater than an eſtate for the life of any other perſon, yet here the leſſee has not two diſtinct eſtates in him, but only one freehold, circumſcribed with that limitation, as the meaſure of its continuance.

§ 5. Where

§ 5. Where lands are conveyed to a perſon without any words denoting the quantity of eſtate intended to be given to him, he ſhall, in general, have them for his own life; becauſe every man's words are taken moſt ſtrongly againſt himſelf, and for the benefit of the grantee, to avoid all equivocation. 1 Inſt. 42 *a.* 183 *a.* Vide Tit. 32.

§ 6. The eſtates for life mentioned in the preceding ſections, will generally endure as long as the life or lives for which they are granted. But there are ſome eſtates for life which may determine upon future contingencies, before the death of the perſons to whom they are granted. Thus, if an eſtate be given to a woman, *dum ſola fuerit*, or *durante viduitate*, or to a man and a woman during coverture, or as long as the grantee ſhall dwell in a particular houſe; in all theſe caſes the grantees have eſtates for life, determinable upon the happening of theſe events. 1 Inſt. 42 *a.*

§ 7. If a man grants a manor worth 10 l. a year to *J. S.* until he has received 100 l. out of it, this will give him an eſtate for life in the manor; for, as the profits are uncertain, and may riſe and fall, no preciſe time can be fixed for the determination of the eſtate. But if *A.* grants a rent of 10 l. to *B.* until *B.* ſhall receive 100 l., the grantee will only have an eſtate for years; becauſe the rent muſt neceſſarily, in ten years, amount to 100 l., and the eſtate will then determine. 1 Inſt. 42 *a.* 6 Rep. 35 *b.*

§ 8. Where a perſon deviſes lands to his executors for payment of his debts, and until his debts are paid, although the determination of ſuch an eſtate be uncertain, 1 Inſt. 42 *a.* 8 Rep. 96 *a.* 1 P. Wms. 509.

certain, yet it is not an eſtate for life. The reaſon of this conſtruction is, that, if it were deemed an eſtate for life, it muſt determine at the death of the executors, which would fruſtrate the intention of the teſtator, as all the debts might not then be paid. The law, therefore, gives the executors a chattel intereſt, which will go to their executors, and continue until all the teſtator's debts are paid; and the freehold and inheritance will deſcend in the meantime to the heir. But if a limitation of this kind be made by deed, it is a freehold conditional.

Sir A. Corbitt's Caſe, 4 Rep. 81 *b.* S. P.

Cro. Eliz. 316.

Tenants for Life hold of the Grantors.

§ 9. Tenants for life hold of the grantors by fealty, and ſuch other reſervations as are contained in the deed by which the eſtate is created; and where there is no reſervation, they hold by fealty only. This eſtate not being comprehended within the proviſions of the ſtatute *quia emptores*.

Are entitled to Eſtovers.

1 Inſt. 41 *b.*

§ 10. With reſpect to the incidents to an eſtate for life, the firſt is eſtovers, that is, an allowance of neceſſary wood, which the tenant may take upon the land without any aſſignment; unleſs he is reſtrained by ſpecial covenants, for *modus et conventio vincunt legem*. But affirmative covenants do not reſtrain.

§ 11. *Spelman* ſays, the word eſtovers, *eſtoverium*, is derived from the *French* word *eſtoffe*, which ſignifies materials. It is uſed in this ſenſe in the ſtatute of *Weſtminſter* 2. c. 25., which gives an aſſize of *novel diſſeiſin de eſtoveriis boſci*.

§ 12. Tenants

§ 12. Tenants for life are allowed three kinds of eſtovers, or, as it is called in the old *Saxon* dialect, *Botes*, namely, houſebote, which is twofold *eſtoverium ædificandi et ardendi;* ploughbote, that is, *eſtoverium arandi;* and laſtly, haybote, that is, *eſtoverium claudendi.* 1 Inſt. 41 *b.* 13 Rep. 68.

§ 13. If the tenant for life exceeded what was conſidered as reaſonable eſtovers, he went beyond that to which he was entitled, and ſo far encroached on the *proprietas*, and became guilty of waſte. Thus, if a tenant for life félled timber trees, or pulled down houſes, it amounted to waſte: for the deſtruction of thoſe things which are not included in the temporary profits of the land, are not neceſſary to the tenant's complete enjoyment of the eſtate, but tends to the permanent and laſting loſs of the perſon entitled to the *proprietas* or inheritance. But cannot commit Waſte.

§ 14. Lord *Coke* ſays, that waſte is a word taken from the *Latin*, *vaſtum a vaſtando*, and ſignifies the waſting and deſtroying an eſtate. Waſte is either voluntary, which is a crime of commiſſion, or it is permiſſive, which is a matter of omiſſion only. Voluntary waſte chiefly conſiſts, 1ſt, in felling timber trees; 2d, pulling down houſes; 3d, opening mines or pits; 4th, changing the courſe of huſbandry; 5th, deſtroying heir looms. Different Kinds of Waſte. 1 Inſt. 52 *b.*

§ 15. The firſt ſpecies of waſte conſiſts in felling timber trees, which are not deemed part of the annual produce Felling Timber. 1 Inſt. 53 *a.* 11 Rep. 48 *b.*

produce of the land, but belong to the owner of the inheritance: and, therefore, the tenant for life has only a qualified property in them, as far as they afford him ſhade and ſhelter, and a right to take the maſt and fruits of them. But tenant for life has a right to cut down underwood, becauſe it is a part of the annual produce of the eſtate.

1 Saund. 322. n. 5.
11 Rep. 48 *a.* & *b.*

§ 16. If the leſſor fells the trees, the leſſee may maintain an action of treſpaſs againſt him, and will be entitled to recover damages adequate to the loſs of his particular intereſt, and alſo for the entry into his land. But the intereſt of the body of the trees remains in the leſſor, as parcel of his inheritance, who may puniſh the leſſee in an action of waſte, if he fells or damages any of them. So that, both the leſſor and the leſſee have an intereſt in the trees; therefore, if a ſtranger cuts them down, each of them ſhall have an action againſt him, to recover his reſpective loſs.

1 Inſt. 57 *a.* n. 2.

1 Sand. 322. n. 5.
Foſter v. Spooner, Cro. Eliz. 18.

§ 17. Where the trees are excepted in the leaſe, the leſſee has no manner of intereſt whatever in them, and the leſſor may have an action of treſpaſs againſt him, if he either fells or damages them. The leſſor has alſo a power by law, as incident to the exception, to enter into the lands, in order to fell and take away the trees, though this power, for the greater caution, is often expreſsly reſerved to him.

1 Inſt. 53 *a.*
2 Inſt. 643.

§ 18. Timber trees are thoſe which ſerve for buildings or reparations of houſes, ſuch as oak, aſh, and elm,

elm, of the age of twenty years and upwards. And, by the cuſtom of ſome countries, certain trees not uſually conſidered as timber, are deemed to be ſuch, being there uſed for building. Thus it was determined in 8 *Jac.* 1. by the Lord Chancellor, that, in the county of *York*, birch trees were timber, becauſe they were uſed in that country for building ſheep-houſes, cottages, and ſuch mean buildings: and all the juſtices of Serjeants Inn, upon a conference had with them, were of opinion, that in the county of *York*, birch trees were timber, and belonged to the inheritance; and therefore could not be taken by the tenant for life.

Counteſs of Cumberland's Caſe, Moor 812.

§ 19. Lord Chancellor *King* is reported to have ſaid, "It is the cuſtom of the country that makes ſome trees "timber, which, in their nature, generally ſpeaking, "are not ſo; as horſe-cheſnuts and lime trees, ſo of "birch, beech, and aſp: and as to pollards, notwith-"ſtanding what is ſaid in *Plowden*, 470, in the caſe of "*Soby* v. *Molyns*, that theſe are not timber, and that "tythes are to be paid of their loppings, (which could "not be, if pollards were timber); yet, if the bodies "of them be ſound and good, I incline to think "them timber: *ſecus*, if not ſound, they being, in "ſuch caſe, fit for nothing but fuel."

2 P. Wms. 606.

§ 20. There is no diſtinction, either in law or equity, between cutting down young timber trees that are not come to their full growth, and decayed timber.

3 Atk. 95.

1 Inſt. 53 *a.*

§ 21. If the tenant for life tops timber trees, or does any thing elſe, which cauſes them to decay, it is waſte. So, if he ſuffers the young germins or ſhoots to be deſtroyed, or ſtubs them up, it is alſo waſte.

Idem.

§ 22. Lord *Coke* ſays, that, cutting down willows, beech, birch, aſp, maple, or the like, ſtanding in the defence and ſafeguard of the houſe, is deſtruction: and if there be a quickſet fence of whitethorn, if the tenant ſtub it, or ſuffer it to be deſtroyed, an action of waſte will lie.

Lee v. Alſton, 1 Bro. R. 195.

§ 23. Where lands were directed to be incloſed by a private act of parliament, and the tenants for life were allowed to raiſe money by mortgage to pay the expence of the incloſure, a tenant for life was not permitted to cut down timber to defray the expence of incloſing, but was directed to raiſe the money by mortgage. For it makes a great difference to the reverſioner, whether the tenant for life charges by way of mortgage, where he is obliged to keep down the intereſt, or cuts down the timber, which would be of value to him when he comes to the eſtate: and ſo it does to the tenant for life, who, if he can cut down the timber, pays nothing.

Pulling down Houſes. 1 Inſt. 53 *a.*

§ 24. Lord *Coke* ſays, that waſte may be done in houſes by pulling or proſtrating them down.

Opening Pits or Mines. 1 Inſt. 53 *b.* 54 *b.*

§ 25. A tenant for life cannot dig for gravel, lime, clay, brick, earth, ſtone, or the like, unleſs for the reparation of buildings, or manuring of the land;

nor can he open a new mine; but he may dig and take the profits of mines that are open. And, in a modern caſe, Lord Chancellor *King* ſaid, that a tenant for life ſhall no more open mines than cut down timber trees: for they are part of the inheritance. But, in a ſubſequent caſe, his Lordſhip ſaid, that a tenant for life of coal mines, may open new pits or ſhafts for working the old vein of coals, for otherwiſe, the working the ſame mines would be impracticable.

Saunder's Caſe, 5 Rep. 12 *a.* 2 P. Wms. 242.

Clavering v. Clavering, 2 P. Wms. 388.

§ 26. The converſion of one ſpecies of land into another, as the changing of meadow into arable, is alſo waſte. For, as Lord *Coke* ſays, it not only changes the courſe of huſbandry, but alſo the evidence of the eſtate.

Changing the Courſe of Huſbandry. 1 Inſt. 53 *b.* Dyer 37 *a.* 2 Roll. Ab. 814. 2 Boſanq. Rep. 86.

§ 27. The Court of Chancery will award a perpetual injunction to reſtrain waſte by ploughing, burning, breaking, or ſowing of down land.

§ 28. Mr. *Worſley* being tenant for life of a farm and lands in *Dorſetſhire*, which conſiſted of 320 acres of poor arable land and a ſheep walk, and about 400 acres of down land, under the will of Lady *Stuart*, who alſo left a writing under her hand, forbidding Mr. *Worſley* from ploughing ſuch lands as ought not to be ploughed, ploughed up, broke, and burnt part of the down land: a perpetual injunction was awarded and confirmed by the Houſe of Lords.

Worſley v. Stuart, 7 Bro. Parl. Ca. 377.

Deſtruction of Heir Looms.

Tit. 1. ſ. 16. 2 Inſt. 304.

§ 29. As ſome chattels are deemed, in law, to be a part of the inheritance, and called *heir looms*, ſo the deſtruction of them is waſte. Thus, if a perſon is tenant for life of a park, vivary, warren, or dove-houſe, and he kills ſo many of the deer, fiſh, game, or doves, that there is not ſufficient left for the ſtores, having regard to the number that were there when his eſtate was created, it is waſte.

Permiſſive Waſte.

1 Inſt. 53 *a.*

§ 30. Permiſſive waſte chiefly conſiſts in ſuffering the buildings on an eſtate to be uncovered, whereby the ſpars or rafters, planchers, or other timbers of the houſe, are rotten. But if the houſe be uncovered when the tenant comes into it, there is no waſte in ſuffering it to fall down.

Id. 54 *b.*

§ 31. If a houſe be ruinous at the time when the tenant for life obtains the poſſeſſion, he is not puniſhable for ſuffering it to fall down; for, in that caſe, he is not bound by law to repair it. And yet, if he cuts down timber growing upon the ground and therewith repairs it, he may juſtify; and the reaſon is, (ſays Lord *Coke*), that the law doth favour the ſupportation and maintenance of houſes of habitation for mankind.

2 Roll. Ab. 820. Bro. Ab. Tit. Condition 40.

§ 32. It is a general rule, that waſte which enſues from the act of God, is excuſable; ſo that, if a houſe falls in conſequence of a tempeſt, the tenant ſhall be excuſed in an action of waſte. But where a houſe is uncovered by tempeſt, the tenant is bound to repair it, within a reaſonable time before the timber grows rotten.

§ 33. If

§ 33. If the banks of a river are deſtroyed by a ſudden flood, it is not waſte. But if the banks on the river *Trent* are unrepaired, it is waſte; becauſe the *Trent* is not ſo violent, but that the leſſee, by his induſtry, may well enough preſerve the banks, and make the water run within its bounds. 1 Inſt. 53 *b.* Mo. 69. p. 187.

§ 34. The Court of Chancery will not decree a tenant for life to repair, or appoint a receiver with directions to repair. Wood v. Gaynon, Amb. 395.

§ 35. By the common law, where lands were granted to a perſon for life, he was not liable to an action for waſte, unleſs he was reſtrained, by particular words in his conveyance, from committing waſte: becauſe it was in the power of the perſon who created the eſtate, to impoſe ſuch terms on the tenant as he thought proper. But although this doctrine might appear ſufficiently rational in theory, yet it was found extremely inconvenient in practice; as ſuch tenants took advantage of the ignorance of their landlords, and, availing themſelves of this defect in the law, frequently committed acts of waſte and depredation on their lands, not only injurious to the owners of the inheritance, but alſo of great detriment to the public. Of the Action for Waſte. 2 Inſt. 145.

§ 36. To remedy this grievance, the ſtatute of *Marlbridge*, 52 *Hen.* 3. c. 24., gave to the owners of the inheritance an action of waſte againſt tenants for life; in which, they were entitled to recover full damages for the waſte committed. But as the recompence given by this ſtatute was frequently inadequate 2 Inſt. 144.

2 Inſt. 299. to the loſs ſuſtained, the ſtatute of *Glouceſter*, 6 *Ed.* 1. c. 5., increaſed the puniſhment, by declaring, that the place waſted ſhould be recovered, together with treble damages, as an equivalent for the injury done to the inheritance.

1 Inſt. 54 *a.* 2 Inſt. 303. § 37. Lord *Coke* ſays, that, if waſte be done *ſparſim* in a wood, the whole wood ſhall be recovered, or ſo much wherein the waſte *ſparſim* is done; and ſo in houſes, ſo many rooms ſhall be recovered, wherein there is waſte done. But if waſte be done *ſparſim* throughout, all ſhall be recovered.

2 Inſt. 304. § 38. Where a perſon is tenant for life of a park, vivary, warren, or dovehouſe, if he deſtroys the deer in the park, the fiſh in the vivary, the game in the warren, or the doves in the dovehouſe, it is waſte: and the perſon entitled to the inheritance, ſhall recover the park, vivary, warren, or dovehouſe.

2 Inſt. 306. § 39. The perſon entitled to the reverſion may either enter himſelf, or appoint a perſon to enter for him, on lands held for life, to ſee if any waſte be done.

1 Inſt. 53 *b.* 218 *b.* n. 2. § 40. No perſon is entitled to an action of waſte againſt a tenant for life, but he who has the immediate eſtate of inheritance, expectant on the determination of the eſtate for life. If, between the eſtate of the tenant for life, who commits waſte, and the ſubſequent eſtate of inheritance, there is interpoſed an eſtate of freehold to any perſon in *eſſe*, then, during the continuance of ſuch interpoſed eſtate, the action

of

of waſte is ſuſpended: and if the firſt tenant for life dies during the continuance of ſuch interpoſed eſtate, the action is gone for ever.

§ 41. It was reſolved in 35 & 36 *Eliz.* in the Common Pleas, that if there be tenant for life, the remainder for life the remainder in fee; if the tenant for life commits waſte in trees, and afterwards he in remainder dies, the action for waſte is maintainable for waſte done in the life of him in remainder for life; for it was to the diſinheritance of him in the remainder in fee; and now the impediment, which was the mean eſtate for life, is taken away; "*et remoto impedimento emergit actio.*" And as it was there ſaid, ſo it was adjudged in 9 *Eliz.* the ſame law, if he, in remainder for life, after the waſte, ſurrender his eſtate to him in the remainder or reverſion in fee.

Paget's Caſe, 5 Rep. 76 *b.* Bray v. Frary, Cro. Ja. 688.

§ 42. Mr. Serjeant *Williams*, in his excellent notes on *Saunder's* Reports, obſerves, that the action for waſte is now very ſeldom brought, and has given way to a much more expeditious and eaſy remedy by an action on the caſe in the nature of waſte.

2 Saund. 252. n. 7.

It has this advantage over an action of waſte, that it may be brought by him in the reverſion or remainder for life or years, as well as in fee or in tail: and the plaintiff is entitled to coſts in this action, which he cannot have in an action of waſte.

§ 43. Lord *Coke* ſays, that after waſte done, there is a ſpecial regard to be had to the continuance of the

1 Inſt. 53 *b.*

reverſion in the ſame ſtate that it was at the time of the waſte done; for if, after the waſte, the reverſioner grants it over, though he takes back the whole eſtate again, yet is the waſte diſpuniſhable.

2 Inſt. 302. § 44. Where a tenant for life or years commits waſte, and afterwards aſſigns over his eſtate, yet an action of waſte may be brought againſt him. Becauſe, in the eye of the law, he is tenant as to the action, and againſt him who was the wrong doer, did the action accrue, which he cannot avoid by his aſſignment.

Court of Equity. § 45. It is ſaid in 1 *Roll's Ab.* 377. p. 13. that if there be leſſee for life, the remainder for life, the reverſion or remainder in fee, and the leſſee in poſſeſſion waſtes the land, though he is not puniſhable by the common law during the remainder for life, yet he may be reſtrained in Chancery: for this is a particular miſchief; and in *Moor* 554. Pl. 748. Lord Keeper *Egerton* is reported to have ſaid, that he had ſeen a precedent in the time of *Rich.* 2., where, in ſuch a caſe, it was decreed in 3 Atk. 723. Chancery, by the advice of the judges, on complaint of the remainder man in fee, that the firſt tenant ſhould not commit waſte; and an injunction was granted.

§ 46. In modern times, courts of equity have interfered in caſes of waſte, by granting an injunction *pendente lite*, which is found to be more effectual than Gibſon v. Smith, 2 Atk. 182. the ancient writ of eſtrepement. And Lord *Hardwicke* has ſaid, that it is not neceſſary the plaintiff ſhould wait till

till the waſte is actually committed; for, where an intention of committing waſte appears, and the defendant inſiſts on his right to commit waſte, the court will grant an injunction.

§ 47. The Court of Chancery has alſo frequently granted an injunction againſt waſte, where no action of waſte lay at law.

§ 48. Thus, where a tenant for life in remainder filed a bill againſt the tenant for life in poſſeſſion, for an injunction to ſtay waſte, Lord *Hardwicke* granted it; and ſaid, that if truſtees to preſerve contingent remainders had brought a bill againſt the tenant for life to ſtay waſte, they might have ſupported it. Perrot v. Perrot, 3 Atk. 94.

In another caſe, his Lordſhip ſaid, that he would have no ſcruple to grant an injunction to ſtay waſte in favour of an unborn child. 3 Atk. 211.

§ 49. Although no action of waſte lies where there is an intermediate eſtate, yet if waſte be done by felling timber trees, the perſon entitled to the inheritance may ſeize them, or may bring an action of trover for the recovery of them: for a tenant for life has but a ſpecial intereſt or property in trees growing on the land, ſo long as they are annexed to the land; but if the tenant for life, or any other perſon, ſevers them from the land, the property and intereſt of the tenant for life in them is thereby determined, and they become the property of the owner of the inheritance. The Timber belongs to the Perſon entitled to the Inheritance. 11 Rep. 81 *b.* 5 Rep. 76 *b.* Paget's Caſe.

§ 50. Where

§ 50. Where an eſtate is limited to ſeveral perſons for life, with remainder to their firſt and other ſons in tail, the firſt tenant in tail who is born, becomes entitled to any timber felled by the tenant for life.

Uvedale v. Uvedale, 2 Roll. Ab. 119.

A feoffment was made of land to the uſe of *A.* for life, remainder to his firſt and other ſons in tail, remainder to *B.* for life, remainder to his firſt and other ſons in tail; and *B.* had iſſue a ſon, whereby he was tenant in tail in remainder, and afterwards *A.*, not having any ſon, cut down timber trees, and ſold part of the timber; and *B.*'s ſon ſeiſed the reſt, and *A.* reſeiſed it. It was held, that the ſon of *B.* might have an action of trover againſt *A.* for all the timber; for the mere property of the trees was in him who had the immediate inheritance of the land, at the time of the cutting of them. And though the remainder for life to *B.* was an impediment to an action of waſte during his life, yet it was not any impediment to *C.* as to the property of the trees, being ſevered from the land, which *B.* could not have for the debility of his eſtate. And the poſſibility of the eſtate which might come to the ſon of *A.*, if he ſhould have one, was not any impediment, inaſmuch as it was a mere poſſibility, which never might happen, and was nothing in law till it happened, and might be deſtroyed by the feoffment of *A.*

Vide Garth v. Cotton, Tit. 16.

§ 51. The timber growing on an eſtate, whereof a perſon is tenant for life, may be cut down if in a ſtate of decay, by order of the Court of Chancery, for the benefit

benefit of the perſons entitled to the inheritance. But no damage muſt be done to the tenant for life.

§ 52. *A.* was tenant for life, remainder to *B.* in tail, as to one moiety, remainder as to another moiety, to an infant. There was timber upon the premiſes greatly decaying; whereupon *B.*, the remainder man, brought a bill, praying that the timber that was decaying might be cut down; and that the plaintiff, the remainder man in tail, together with the other remainder man, the infant, might have the money ariſing by the ſale of this timber. On the other hand, the tenant for life inſiſted to have ſome ſhare of the money.

Whitfield v. Bewitt, 2 P. Wms. 240.

Lord Chancellor *Talbot*,—" 1ſt. The timber, while " ſtanding, is part of the inheritance; but whenever " it is ſevered, either by the act of God, as by tempeſt, " or by a treſpaſſer and by wrong, it belongs to him " who has the firſt eſtate of inheritance, whether in " fee or in tail; who may bring trover for it: and this " was ſo decreed upon occaſion of the great windfall " of timber on the *Cavendiſh* eſtate.

" 2dly. As to the tenant for life, he ought not to " have any ſhare of the money ariſing by the ſale of " this timber; but ſince he has a right to what may " be ſufficient for repairs and botes, care muſt be taken " to leave enough upon the eſtate for that purpoſe; " and whatever damage is done to the tenant for life, " on the premiſes by him held for life, the ſame ought " to be made good to him,

" 3dly,

"3dly. With regard to the timber plainly decaying, "it is for the benefit of the perſons entitled to the "inheritance, that it ſhould be cut down, otherwiſe it "is of no value; but this ſhall be done with the appro- "bation of the maſter; and trees, though decaying, "if for the defence and ſhelter of the houſe, or for "ornament, ſhall not be cut down. *B.*, that is the te- "nant in tail (and of age) of one moiety, is to have a "moiety of the money, ſubject to ſuch deductions as "aforeſaid; the other moiety, belonging to the infant, "muſt be put out for the benefit of the infant on "government or real ſecurities, to be approved of by "the maſter."

§ 53. The Court of Chancery has alſo permitted the timber growing on an eſtate, whereof a perſon was tenant for life, to be cut down for the purpoſe of paying of legacies, which were charged upon the inheritance.

Claxton v. Claxton, 2 Vern. 152.

§ 54. A perſon deviſed his eſtate to his widow for life, remainder to *A. B.* and his heirs, upon condition that he ſhould pay ſeveral legacies, at the times appointed in his will; and if he did not pay them accordingly, remainder over to another perſon.

A. B. filed his bill in the Court of Chancery, ſtating that there was a great quantity of timber on the eſtate which belonged to him; that he was willing it ſhould be ſold, and the legacies paid; but that the widow, who had barely an eſtate for life, and could make no profit thereof herſelf, in combination with the other remainder

remainder man, deſigning to make the plaintiff forfeit his eſtate by non-payment of the legacies, had refuſed him permiſſion to fell the timber, though he offered ſatisfaction for any damage ſhe ſhould thereby ſuſtain: and therefore prayed that he might have liberty to cut down and carry off the timber, and ſell it for payment of the legacies. The court thought it reaſonable that the plaintiff ſhould have liberty to cut down and take off the timber, making ſatisfaction to the widow for breaking the ground, *&c.*; and referred it to the maſter to ſee what quantity of timber was neceſſary to be felled for payment of the legacies, and what might be conveniently ſpared.

§ 55. Where the tenant for life has alſo within himſelf the next exiſtent eſtate of inheritance, ſubject to intermediate contingent remainders, he ſhall not take advantage of his own wrong, by cutting down timber; but the Court of Chancery will preſerve it for the benefit of the contingent remainder men.

§ 56. The Duke of *Bolton* was tenant for life, with contingent remainders to his firſt and other ſons, remainder to Mrs. *Orde* for life, remainder to her firſt and other ſons, with other contingent remainders over (with eſtates to truſtees to preſerve all the contingent remainders), remainder to the Duke in fee. Mrs. *Orde* had a ſon born, who died in a few days after his birth. All the contingent remainders being yet in expectancy, the Duke cut down timber. Mrs. *Orde* had afterwards another ſon, who was a defendant in the cauſe. On the

Williams v. Duke of Bolton, 3 P. Wms. 268. note 1.

the queſtion to whom this timber ſhould belong, the Lord Chancellor was of opinion, that as it was not competent for the Duke to cut down timber, in reſpect of his life eſtate, he ſhould not take advantage of his own wrong. That the timber, although by ſeverance became perſonalty, was yet bound, as far as it could be, to the uſes of the realty. That the adminiſtrator of Mrs. *Orde*'s firſt ſon was certainly not entitled, the child being dead at the time of the timber cut; neither could her ſecond ſon claim it, for although he had a veſted eſtate of inheritance, yet ſuch eſtate was liable to be deveſted by the Duke's having a ſon; his Lordſhip therefore thought nobody entitled at preſent, but directed the Duke to pay into Court, to the credit of the cauſe, the money for which the timber had been ſold, and the intereſt thereof.

Vide Garth v. Cotton, Tit. 16.

Of Waſte by Corporations Sole.

§ 57. With reſpect to waſte by corporations ſole, ſuch as a biſhop, parſon, or vicar; if ſuch perſons cut down trees upon the lands of the church, unleſs it be for reparations, they may be puniſhed for the ſame in the eccleſiaſtical court, and alſo by writ of prohibition. Lord *Coke* has cited a caſe where, upon complaint to the king in parliament that the biſhop of *Durham* had committed waſte, by deſtroying the timber belonging to his church, a prohibition had iſſued againſt him. And in another caſe, Lord *Coke* is reported to have ſaid, that if a biſhop cut down and ſold trees, and did not employ them for reparation, and any one would move it, he would grant a prohibition out of the Court of King's Bench.

11 Rep. 49 *a*.

Stockman v. Whither, Roll. Rep. 86.

§ 58. The

§ 58. The authority of this *dictum* of Lord *Coke* has been doubted in a modern caſe, in which it was determined by the Court of Common Pleas, that that Court had no power to iſſue an original writ of prohibition, to reſtrain a biſhop from committing waſte in the poſſeſſions of his ſee, at leaſt at the ſuit of an unintereſted perſon; and the Court ſeemed alſo to doubt whether even the Court of King's Bench had ſuch a power.

Jefferſon v. Ep. Durham, 1 Boſ. and P. 105.

It appears, however, that the Court of Chancery has this kind of juriſdiction; for a caſe is reported in 2 *Roll's Ab.* 813. in which Lord Keeper *Coventry* granted a prohibition, at the ſuit of a patron, againſt a prebendary, for having waſted the trees of his prebend.

Ackland v. Atwell.

§ 59. At common law, tenants for life were not anſwerable for damages done by fire, whether it aroſe from accident or negligence. But when the ſtatute of *Glouceſter* rendered tenants for life anſwerable for waſte without any exception, it rendered them anſwerable for damages done by fire. But now, by the ſtatute 6 *Ann.* c. 31. all perſons are exempted from actions for accidental fire in any houſe.

Of Accidents by Fire.

1 Inſt. 57 *a.* n. 1.

§ 60. By the ſeventh ſection of this ſtatute it is provided, that nothing in the act ſhall extend to defeat or make void any contract or agreement made between landlord and tenant.

In conſequence of this clauſe it has been held, that where a tenant for life, under a ſettlement, covenanted to

Cheſterfield v. Bolton, 2 Com. R. 626.

to keep a houſe in good and ſufficient repair, and the houſe was burned down by accident, he was bound to rebuild it.

6 Term Rep. 651.

It is now become uſual, where it is intended that the tenant ſhall not be liable to rebuild in caſe of accidental fire, to except it in the covenant to repair.

Of the Clauſe without Impeachment of Waſte.

§ 61. It has been long uſual, where eſtates for life are limited by expreſs words, to inſert a clauſe that the tenant for life ſhall have the lands "without impeachment of waſte." This clauſe is of great antiquity, and it was originally held, that it only exempted the tenant for life from the penalties of the ſtatute of *Marlebridge*, but did not give the property of the thing waſted. It was, however, afterwards determined, that theſe words gave the tenant for life power to cut down all ſorts of timber trees, and to convert them to his own uſe: and alſo, that where timber, parcel of a building, or timber trees were blown down, they became the property of the tenant for life.

4 Rep. 62 *b.*

1 Inſt. 220 *a.* 11 Rep. 82 *b.* 3 Veſ. 265.

Pyne v. Don, 1 Term R. 55.

Does not extend to malicious Waſte.

§ 62. This clauſe does not, however, enable the tenant for life to commit waſte maliciouſly, by pulling down houſes, or cutting down timber, which ſerves for ornament or ſhelter, or which is not fit to be felled; for, in that caſe, the Court of Chancery will reſtrain the tenant for life by injunction.

Vane v. Ld. Bernard, 2 Vern. 738.

§ 63. Lord *Bernard*, on the marriage of his ſon, ſettled *Raby* caſtle on himſelf for life, without impeachment of waſte, remainder to his ſon for life, &c.

Lord

Lord *Bernard* having taken ſome diſlike to his ſon, got 200 workmen together, and ſtripped the caſtle of the iron, lead, doors, *&c.* to the value of 3000*l.* The Court of Chancery immediately granted an injunction to ſtay committing of waſte, in pulling down the caſtle; and upon the hearing of the cauſe, decreed not only the injunction to continue, but that the caſtle ſhould be repaired, and put in the ſame condition it was formerly in, at the expence of Lord *Bernard.*

§ 64. A bill was brought by a remainder man, to reſtrain a tenant for life, without impeachment of waſte, from cutting timber in *Weſtwood* park, improper to be felled.

Pocklington v. Pocklington, 5 Bac. Ab. 491.

The Lord Chancellor granted an injunction to reſtrain the defendant from cutting timber which ſerved for ſhelter or ornament; and alſo any other timber in the park, which was not of proper growth to be felled. And his Lordſhip declared, that courts of equity had, in this reſpect, eſtabliſhed rules much more reſtrictive than thoſe of the common law, which gave tenant for life, without impeachment of waſte, as large a power over the timber, as tenant in fee-ſimple; that timber might be had for the public uſe.

§ 65. The huſband of a lady, who was tenant for life, without impeachment of waſte, pulled down ſeveral houſes and outbuildings, and ſold the ſame; took up lead pipes, and cut down ſeveral groves of trees, that were planted for the ſhelter and ornament of the manſion-houſe.

Rolt v. Lord Somerville, 2 Ab. Eq. 759.

A bill was brought to compel the tenant for life to account for the money thus raiſed, and to put the eſtate in the ſame plight and condition that it was before. The defendant demurred, inſiſting that this waſte was committed by a tenant for life without impeachment of waſte, and therefore he was not liable to be called to an account, either at law or in equity for what he had done.

Lord *Hardwicke*,—" Though an action of waſte " will not lie at law for what is done to houſes or " plantations for ornament or convenience, by tenant " for life without impeachment of waſte, yet this Court " hath ſet up a ſuperior equity, and will reſtrain the " doing ſuch things on the eſtate.

Ante, f. 63. " In Lord *Bernard*'s caſe, the Court reſtrained him " from going on, and ordered the eſtate to be put in " the ſame condition. In Sir *Blundel Charleton*'s caſe, " the Maſter of the Rolls decreed, that no trees ſhould " be cut down that were for the ornament of the " park; but Lord Chancellor *King* reverſed that, " and extended it only to trees that were planted in " rows. My only doubt is as to the trees that have " been cut down, for if this bill had been brought " before ſuch trees had been cut down, as were for the " ornament or ſhelter of the eſtate, this Court would " have interpoſed; but here the miſchief is done, and " it is impoſſible to reſtore it to the ſame condition, " as to the plantations; and therefore it can lie in " ſatisfaction only; and I cannot ſay the plaintiff is " entitled to a ſatisfaction for the timber, which is a " damage

" damage to the inheritance: yet as to the pulling " down the houſes and buildings, and taking up the " lead pipes, they may be reſtored, and put in as good " condition again."

The demurrer was allowed, as to ſatisfaction on account of timber, but over-ruled as to the reſt.

§ 66. A bill was brought againſt a lady, who was tenant for life without impeachment of waſte, to enjoin her from committing further ſpoil and deſtruction, and for ſatisfaction for the damage ſhe had already done; ſuggeſting ſhe had cut down ſuch timber, as was not fit even for repairs, as young ſaplings, *&c.* not leaving a twig on the eſtate.

Aſton v. Aſton, 1 Veſ. 264.

Lord *Hardwicke*, after ſtating the general doctrine, ſays, " It is therefore inferred, that the Courts ought " in general to grant an injunction againſt tenant for " life without impeachment of waſte, for cutting " down any timber not full grown, or proper for " building; or any, the doing of which might be a " ſpoil to the eſtate in future. Something of that " kind might be wiſhed for, but it is, in general, dif- " ficult to attain, and inconvenient to do it; nor does " it fall within the reaſoning of the caſes cited. Was " the court to take ſuch large ſtrides, reſort muſt " always be had to a court of equity; for no certain " rule can be laid down, as it cannot be taken " from the value of the trees, which will differ ac- " cording to the ſort and circumſtances: nor from " the purchaſe of eſtates; and ſome timber may be " fit for one kind of building, not for others. But

" the reaſoning of the caſes of pulling down farm or " manſion-houſes, or trees for ornament or ſhelter, " does not come up to this; for the conſequence of " cutting down timber, perhaps too young, does not " tend to the deſtruction of the thing ſettled, although " it tends to its prejudice for a time; for timber will " grow again in a few years: not ſo of houſes. Nor " will young trees planted in avenues pulled down, " ſerve for the purpoſes as before; for, having been " put there for the convenient enjoyment of the houſe, " they are conſidered as appurtenant thereto, and can " no more be deſtroyed by ſuch tenant for life, than " the houſe itſelf. But it would be very dangerous " for the court to uſe ſuch a latitude as to extend this " to the taking away the profits of the eſtate by te- " nant for life, to the prejudice of the remainder " man; which his eſtate for life, without impeach- " ment of waſte, gives him liberty to do." An in- junction was notwithſtanding granted.

Strathmore v. Bowes, 2 Bro. Rep. 88.

§ 67. An injunction was moved to reſtrain Mr. *Bowes*, the huſband of Lady *Strathmore*, who was tenant for life without impeachment of waſte, from cutting timber, or doing any waſte in the rides or avenues to the houſe, or cutting timber that was for ſhade or ornament to the houſe, and trees unfit to cut as timber. Sir *Lloyd Kenyon*, M. R. granted the injunction, ſaying, it ought to include every thing uſeful or ornamental to the houſe. A ride through a wood is more conſtitutive to the beauty of the place; and he thought himſelf bound to grant an injunction as to the ornamental trees, though they ſhould not be planted trees, but trees

trees growing naturally, and to extend it to cutting young ſaplings, and trees not fit to cut as timber. Vide Piers v. Piers, 1 Veſ. 521.

§ 68. A tenant for life without impeachment of waſte, is, notwithſtanding, obliged to keep tenants houſes in repair, and ſhall not ſuffer them to run to ruin. 2 Atk. 383.

§ 69. The privilege given by the words, without impeachment of waſte, is annexed to the privity of eſtate, and determines with it. Thus, Lord *Coke* ſays, if a leaſe is made to one for the term of another's life, without impeachment of waſte, the remainder to him for his own life, now he is puniſhable for waſte, for the firſt eſtate is gone and drowned. Is annexed to the Privity of Eſtate. 11 Rep. 83 *b.*

§ 70. It is laid down by the Court of Common Pleas, in 22 *Jac.*, that if a tenant for life without impeachment of waſte, makes a leaſe for years, and the leſſee for years commits waſte, the perſon in remainder ſhall not have an action for waſte; for this leaſe was derived out of the eſtate for life privileged, and if waſte lies, it ſhall be brought againſt the tenant for life who made the leaſe; and he was diſpuniſhable. W. Jones, 51.

§ 71. Where the clauſe without impeachment of waſte is reſtrained by the words, "except voluntary waſte," the tenant is puniſhable for wilful waſte; and has no intereſt in the timber, otherwiſe than the maſt and ſhade, and neceſſary botes. *Per* Lord *Hardwicke.* Dickens R. 188.

Of partial Powers to do Waſte.

§ 72. Some caſes have ariſen where eſtates for life have been deviſed, with partial powers of committing waſte; and the Court of Chancery has interpoſed to reſtrain the deviſees from abuſing ſuch powers.

Hewit v. Hewit, Amb. 508.

§ 73. Lands were deviſed to a perſon for life, with power to cut down ſuch trees as four perſons, named in the will, ſhould allow of, or direct by writing. All the truſtees being dead, Lord *Northington* decreed, that the power of cutting timber remained, but the Court would preſerve the check; and therefore it was referred to the maſter to ſee what trees were fit to be cut down.

Chamberlain v. Dummer, 1 Bro. 166. 3 —— 549.

§ 74. Mr. *Dummer* deviſed his eſtate at *Cranbury* to his wife for life, and in a codicil ſays, "Whereas, by "my will, my wife cannot cut any timber, now my "will and mind is, that ſhe may, during ſo long time "as ſhe may continue my widow, cut timber for her "own uſe and benefit, at ſeaſonable times in the "year."

Mrs. *Dummer*, under this power, made contracts for, and began to fell timber. The perſon in reverſion applied for an injunction to ſtay the cutting of ornamental timber, or ſuch as ſerved for ſhelter to any of the manſion-houſes, and alſo of young trees not come to maturity. The Maſter of the Rolls *ex parte*, made an order to ſtay the cutting of any timber whatever, until anſwer.

On

On a motion to diſcharge this order, Lord *Thurlow* utterly rejected the idea that ſhe was to cut for her own uſe on the eſtate, or for eſtovers only; and thought that ſhe was entitled, not merely to cut timber which would ſuffer by ſtanding, but every thing which could fairly be called timber; although ſhe could not cut ſuch ſticks as would only make paling or ſaplins, not proper to be cut as timber.

§ 75. Lord *Hardwicke* has ſaid, that where there is tenant for life, without power of committing waſte, remainder to another for life, without impeachment of waſte, remainder in fee; the Court will not ſuffer an agreement between the two tenants for life to commit waſte, to take place, againſt the remainder man; before the time comes when the ſecond tenant for life's power commences. 3 Atk. 210. 756.

§ 76. Another incident to an eſtate for life is, that in caſe the tenant dies before harveſt time, his executors will be entitled to the crop then growing on the lands, as a return for the labour and expence of tilling the ground; which the law calls *emblements*. Tenants for life are entitled to Emblements. 1 Inſt. 55 *b*.

§ 77. This rule extends to every caſe where the eſtate for life determines by the act of God, or by the act of the law; but not to thoſe caſes where the eſtate is determined by the act of the tenant. Thus, if a woman holds lands *durante viduitate*, (which is an eſtate for life), and ſows them, and afterwards marries; ſhe will not be entitled to emblements, becauſe her eſtate determined by her own act. Id. Oland's Caſe, 5 Rep. 116 *a*.

Idem. § 78. If a leaſe be made to a huſband and wife during the coverture, and the huſband ſows the lands, and afterwards they are divorced *cauſa præcontractus*, the huſband will be entitled to emblements; for although the ſuit is the act of the party, yet the ſentence which diſſolves the marriage, is the judgement of the law, *et judicium redditur in invitum.*

1 Inſt. 55 *b.* § 79. The under-tenants of perſons ſeiſed for life have ſtill greater advantages, reſpecting emblements, than even their leſſors; for in caſes where an eſtate for life determines by the act of the tenant, the under-tenant ſhall notwithſtanding have the crops which he has ſown.

Idem. § 80. The word emblements only extends to ſuch vegetables as yield an annual profit; ſo that if a perſon, who is tenant for life, plants young fruit trees, or young oaks, aſhes, elms, *&c.*, or ſows the ground with acorns; his executors will not be entitled to them. But it has been determined, that if a tenant for life dies in *Auguſt*, before ſeverance of the hops, his executors ſhall have them, though growing on ancient roots.

Latham v. Atwood, Cro. Car. 515.

§ 81. The advantage of emblements is extended to the parochial clergy (who are all tenants for life) by the ſtatute 28 *Hen.* 8. c. 11. ſ. 6. which enacts, that in caſe any incumbent happens to die, and before his death hath cauſed any of his glebe lands to be manured, and ſown at his proper coſts and charges, with any corn or grain; that then all and every the ſame incumbents

cumbents may make and declare their teſtaments of all the profits of the corn growing upon the ſame glebe lands, ſo manured and ſown. *Qu.* If the incumbent dies inteſtate, whether his adminiſtrator will be entitled to the emblements?

§ 82. In all real actions, a tenant for life may pray in aid, or call for the aſſiſtance of the perſon entitled to the inheritance, to defend his title; becauſe the tenant for life is not ſuppoſed to have in his cuſtody the evidences neceſſary to eſtabliſh the right of the inheritance.

Tenants for Life may pray in Aid.

Booth Real Act. 60.

§ 83. It is laid down in a modern caſe, that when deeds are in the hands of a tenant for life, the Court of Chancery will not take them out of his hands; but when they are not in his hands, the court will not order them to be delivered to him.

Hicks v. Hicks, Dickens R. 650.

§ 84. Another incident to an eſtate for life is, that it is ſubject to merge in the inheritance; and, therefore, whenever the tenant for life acquires the abſolute property or inheritance of the land, the eſtate for life becomes merged, and loſt in the fee-ſimple.

Eſtates for Life are ſubject to merger.

1 Inſt. 338 *b.* Vide 15 Vin. Ab. 365.

§ 85. An eſtate *pour auter vie*, will alſo merge in an eſtate for a man's life, the latter being the moſt valuable. Thus, if an eſtate be limited to a perſon for the life of another, remainder to him for his own life, the firſt eſtate is merged,

Dyer, 10 *b.* 11 Rep. 83 *b.*

§ 86. An

Are not intailable.

Tit. 2.

Low v. Burron, 3 P. Wms. 262.

§ 86. An eſtate for life is not capable of being intailed; for all eſtates tail muſt be eſtates of inheritance: and, therefore, where an eſtate for life or lives is limited to a perſon, and the heirs of his body, the latter words only operate as a deſcription of the perſons who ſhall take, as ſpecial occupants, during the life or lives for which the eſtate is held; and the grantee takes the abſolute property of the eſtate, and may diſpoſe of it by deed, and alſo (I conceive) by his will.

Fearnes ex. Dev. 317. Doe v. Luxton, 6 Term Rep. 291.

Subject to Payment of Intereſt.

Tracy v. Hereford, 2 Bro. R. 128. Penrhyn v. Hughes, 5 Veſ. jun. 99.

§ 87. Tenant for life is only obliged to keep down the intereſt of the incumbrances affecting the inheritance. And it has been lately determined, that the rents and profits of an eſtate for life, muſt be applied, not only in the payment of all intereſt due during the poſſeſſion of the tenant for life, but alſo of all intereſt due before the commencement of that eſtate.

But not Principal. 5 Veſ. jun. 234. 5 —— 107.

1 Bro. R. 218. 1 Veſ. jun. 427.

§ 88. A tenant for life is not, however, ſubject to the payment of any part of the principal money charged upon the inheritance: and, therefore, where a tenant for life pays off an incumbrance, charged on the inheritance, he becomes a creditor on the eſtate for the ſum paid; for, otherwiſe, he muſt be ſuppoſed to have paid it for the benefit of the perſons entitled to the inheritance. But if a tenant for life does any act which ſhews an intention of paying off the charge, for the benefit of the inheritance, he will not, in that caſe, be deemed a creditor.

Of Occupancy.

§ 89. By the common law, where a perſon was tenant *pour auter vie*, or had an eſtate limited to himſelf

ſelf only, without mentioning his heirs, for the life of another, and died during the life of *ceſtui que vie*; the perſon who firſt entered on the land after his death, might lawfully retain the poſſeſſion thereof, as long as the *ceſtui que vie* lived, by right of occupancy.

§ 90. The reaſon that occupancy took place in this inſtance, was, becauſe the land belonged to nobody. It did not revert to the grantor, for he had parted with all his intereſt, as long as the *ceſtui que vie* lived. It did not eſcheat to the lord, for all eſcheats muſt be of the abſolute and entire fee. It did not belong to the grantee, for he was dead. It did not deſcend to his heirs, for there were no words of inheritance in the grant; nor could it veſt in his executors, for they cannot ſucceed to a freehold. The land, therefore, having no legal owner, the law of nature took place, and gave it to the firſt perſon who could enter upon it, as occupant. 2 Comm. 259.

§ 91. If, however, an eſtate, *pour auter vie*, was granted to a man and his heirs, or the heirs of his body, during the life of another perſon, no general right of occupancy could ariſe; and the heir of ſuch grantee might, and ſtill may, enter on the death of his anceſtor, and hold the poſſeſſion; and is ſtill called, in law, a ſpecial occupant, as having a ſpecial excluſive right, by the terms of the original grant, to enter upon and occupy the lands, during the reſidue of the eſtate granted. 2 Roll. Ab. 151. Vaugh. 201.

§ 92. If

Atkinſon v. Baker, 4 Term R. 229.

§ 92. If an eſtate be granted to a perſon, his heirs, executors, adminiſtrators, and aſſigns, during the life of another, and he dies inteſtate, during the life of the *ceſtui que vie*, his heirs ſhall take as ſpecial occupants, in preference to his executors or adminiſtrators.

2 Roll. Ab. 151. 3 Atk. 466.

§ 93. If a leaſe be made of land to *J. S.*, his executors, adminiſtrators, and aſſigns, during the life of *B.*, the executors of *J. S.* ſhall be the ſpecial occupants, if he dies in the life of *B.* For, although it is a freehold, which, in courſe of law, would not go to executors, yet they may be deſigned, by the particular words in the grant, to take as occupants: and ſuch deſignation will exclude the occupation of any other perſon; becauſe the parties themſelves, who originally had the poſſeſſion, have filled it up, by this appointment.

Of the Statute 29 Car. II. and 14 Geo. II.

§ 94. The right of general occupancy is now taken away by the ſtatute 29 *Car.* 2. c. 3., which enacts, that where there is no ſpecial occupant, in whom the eſtate may veſt, the tenant *pour auter vie* may deviſe it by will, or it ſhall go to his heir, as ſpecial occupant, and be aſſets; and if no ſpecial occupant, it ſhall go to his executors or adminiſtrators, and be aſſets in their hands for payment of debts. And, by the ſtatute 14 *Geo.* 2. c. 20., which enacts, that an eſtate of this kind ſhall veſt, not only in the executors, but alſo in the adminiſtrators of the tenant *pour auter vie*; and ſhall go in a courſe of diſtribution like a chattel intereſt.

§ 95. Every

Power of Tenant for Life over his Eſtate.

§ 95. Every tenant for life has a right to the full uſe and enjoyment of the land, and of all his annual profits, during the continuance of the eſtate. He has alſo a power of granting his whole eſtate and intereſt, or any eſtate or intereſt leſs than his own. But if he conveys away a greater eſtate or intereſt, it muſt neceſſarily be void, upon the principle, that *nemo dat quod non habet*; and ſuch conveyance will operate, in many caſes, as a forfeiture of his eſtate, as will be ſhewn in a ſubſequent part of this title.

§ 96. But, where the perſon who is entitled to the inheritance is a party to the conveyance, there the tenant for life may convey a greater eſtate than his own.

What Acts amount to a Forfeiture.

§ 97. Eſtates for life are ſtill conſidered, in ſome reſpects, as ſtrict feuds, being forfeitable for many of the reaſons for which feuds were formerly forfeited. Thus, where a tenant for life takes upon him to convey a greater eſtate or intereſt than that which he has, whereby the reverſion or remainder is diveſted, ſuch conveyance will operate as a forfeiture of his eſtate for life. Becauſe it is a renunciation of the feudal connection between him and his lord; and the perſon in remainder or reverſion may enter for the forfeiture.

Wright's Ten. 203. Gilb. Ten. 38.

§ 98. Alienations of this kind may be either by deed, or by matter of record. By deed, as if a tenant for life makes a feoffment in fee to a ſtranger; it is a forfeiture. So, if there be tenant for life, remainder

1 Inſt. 251 *a*.

for

for life, and both the tenants for life make a feoffment in fee to a ſtranger, it is a forfeiture of both their eſtates. There are, however, ſeveral modern modes of
Tit. 32. conveyance, which do not diveſt the eſtates in remainder or reverſion, and therefore have not the effect of creating a forfeiture of an eſtate for life.

Tit. 35.
Tit. 36. By matter of record: as, where a tenant for life levies a fine, or ſuffers a recovery, ſuch aſſurances will, in general, operate as forfeitures of the eſtate for life, unleſs the perſon in remainder or reverſion is a party to thoſe aſſurances.

Tit. 1. f. 66. § 99. Tenant for life may alſo forfeit his eſtate, by diſclaiming to hold of his lord, or by affirming, or impliedly admitting the reverſion to be in a ſtranger.

This doctrine is grounded on a rule of the feudal law, that, if a vaſſal denied the tenure, he forfeited
2 Bac. Ab. 8. p. 570. his feud. Now, this denial may be when the vaſſal claims the reverſion himſelf, or accepts a gift of it from a ſtranger, or acknowledges the reverſion to be in a ſtranger; for, in all theſe caſes, he denies that he holds the feud from the lord. But as, by the feudal law, the vaſſal was to be convicted of this denial, ſo, in our law, theſe acts which plainly amount to a denial, muſt be done in a court of record, to make them a forfeiture: for ſuch act of denial appearing on record, is equivalent, and equally concluſive, as a conviction upon ſolemn trial; and all other denials that might be uſed by great lords for trepanning their

tenants, and for a pretence to ſeize their eſtates, were by our law rejected: for ſuch convictions might be made by great lords, where there was no juſt cauſe; but the denial of the tenure upon record, could never be counterfeited or abuſed to any injuſtice.

§ 100. If, therefore, tenant for life be diſſeiſed, and bring a writ of right, this is a forfeiture of his eſtate: becauſe, by ſuing a writ of right, he admits the reverſion in fee to be in himſelf, and, by conſequence, denies that he holds over. So it is, if, in a writ of right brought againſt him, he ſhould join the miſe on the mere right; for, by taking upon himſelf the privileges of tenant in fee, he admits the inheritance to be in himſelf, which is a denial of the tenure. Idem. 1 Inſt. 251 *b.*

§ 101. If a ſtranger brings an action of waſte againſt tenant for life, and he pleads *nul waſte fait* in bar to the action, this is a forfeiture; becauſe, by this plea, he admits the ſtranger to be the proper perſon to puniſh the waſte, if there had been any committed. 1 Inſt. 252 *a.* 1 Roll. Ab. 853.

§ 102. If the demandant in a real action recovers againſt the tenant for life, by default, or *nient dedire*, or by pleading covenouſly to the diſheriſon of the perſon in reverſion, theſe are forfeitures of his eſtate; for tenant for life is entruſted with the freehold, and is to anſwer to ſtrangers *præcipes*, and defend his own, as well as the reverſioner's intereſt. But when he gives way to the demandant's action, he admits the right of the reverſion to be in him, and by conſequence denies any tenure of his reverſioner; which is a forfeiture. Idem.

§ 103. If

Idem.

§ 103. If tenant for life prays in aid of him in reverſion, and has it granted to him, and *J. S.* comes into court without proceſs, and ſays he is the perſon of whom aid is prayed, and that he is ready to join in aid, but the tenant for life denies him to be the perſon, and is adjudged to anſwer ſole; if this be the perſon who has the reverſion, the tenant for life has forfeited his eſtate by his denial of him. So it is, if the tenant for life had at firſt prayed in aid of a ſtranger.

TITLE IV.

ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

§ 1. *How this Eſtate ariſes.*
8. *It has ſome Qualities of an Eſtate Tail.*
9. *And others of a bare Eſtate for Life.*
§ 10. *This Tenant is reſtrained from malicious Waſte.*
13. *His Privileges cannot be granted over.*

Section 1.

WE now come to treat of thoſe eſtates for life, which are derived from the operation of ſome principle of law. Of theſe the firſt is called *an eſtate tail after poſſibility of iſſue extinct;* and is thus deſcribed by *Littleton*:—"Where tenements are given "to a man and to his wife, in eſpecial tail, if one of "them die without iſſue, the ſurvivor is tenant in tail "after poſſibility of iſſue extinct." How this Eſtate ariſes. Lit. ſ. 32.

§ 2. "So if they have iſſue, and the one die, "albeit that during the life of the iſſue, the ſurvivor "ſhall not be ſaid tenant in tail after poſſibility of "iſſue extinct, yet if the iſſue die without iſſue, ſo as "there be not any iſſue alive, which may inherit by "force of the tail, then the ſurviving party of the "donees is tenant in tail after poſſibility of iſſue "extinct." Id.

 § 3. "Alſo,

Lit. ſ. 33. § 3. "Alſo, if tenements be given to a man and
" to his heirs, which he ſhall beget on the body o
" his wife; in this caſe the wife hath nothing in th
" tenements, and the huſband is ſeiſed as donee i
" ſpecial tail. And, in this caſe, if the wife die with
" out iſſue, of her body begotten, by her huſband, the
" the huſband is tenant in tail after poſſibility of iſſu
" extinct."

Id. ſ. 34. § 4. "And note, that none can be tenant in tai
" after poſſibility of iſſue extinct, but one of the donee
" or the donee in eſpecial tail. For the donee i
" general tail cannot be ſaid to be tenant in tail afte
" poſſibility of iſſue extinct, becauſe always, during
" his life, he may, by poſſibility, have iſſue, which
" may inherit by force of the ſame intail. And ſo, i
" the ſame manner, the iſſue which is heir to th
" donees in eſpecial tail, cannot be tenant in tai
" after poſſibility of iſſue extinct, for the reaſon
" above ſaid."

1 Inſt. 28 *a*. § 5. Nothing but a moral impoſſibility of having
iſſue can give riſe to this eſtate: Thus Lord *Coke* ſays
" If a man giveth land to a man and his wife, and t
" the heirs of their two bodies, and they live till each
" of them be an hundred years old, and have no iſſue
" yet do they continue tenants in tail, for that the law
" ſeeth no impoſſibility of having children."

Id. § 6. The impoſſibility of having iſſue muſt proceed
from the act of God, and not from the act of the
parties; for if lands be given to a man and his wife
an

and to the heirs of their two bodies, and after they are divorced, *cauſa præcontractus*, or *conſanguinitatis*, or *affinitatis*, their eſtate of inheritance is turned to a joint eſtate for life; and although they had once an inheritance in them, yet for that the eſtate is altered, by their own act, and not by the act of God, *viz.* by the death of either party without iſſue, they are not tenants in tail after poſſibility of iſſue extinct.

§ 7. A perſon may be tenant in tail after poſſibility of iſſue extinct of an eſtate in remainder, as well as of an eſtate in poſſeſſion. And, therefore, if a leaſe for life be made to *A.*, remainder to *B.* and his wife, in ſpecial tail, and *B.* dies without iſſue, his wife will immediately become tenant in tail after poſſibility of iſſue extinct of this remainder. 11 Rep. 81 *a.*

§ 8. This eſtate, though ſtrictly not more than an eſtate for life, yet partakes, in ſome circumſtances, of the nature of an eſtate tail; for a tenant in tail after poſſibility of iſſue extinct has eight qualities or privileges in common with a tenant in tail. It has ſome Qualities of an Eſtate Tail.

1. He is diſpuniſhable for waſte, becauſe he continues in by virtue of the livery upon the eſtate tail; and having once had the power of committing waſte, he ſhall not be deprived of it by the act of God. 1 Inſt. 27 *b.* 2——302.

It is ſaid by *Wray*, Ch. Juſt. that if tenant in tail after poſſibility of iſſue extinct ſells the trees, the perſon entitled to the inheritance ſhall have them. 4 Rep. 63 *a.*

For, inaſmuch as he has but a particular eſtate for life in the land, he cannot have an abſolute intereſt in the trees; but he ſhall not be puniſhed in waſte, becauſe his original eſtate is not within the ſtatute of *Glouceſter*.

1 Roll. Rep. 184. But this is denied by Lord *Coke*, who is reported by *Roll* to have ſaid, that at common law, this tenant had a fee, and, conſequently, full power to fell and diſpoſe of the trees: and notwithſtanding the ſtatute *(De donis)* has made the eſtate to be only for life, yet the privilege and liberty is not taken away.

2. He ſhall not be compellable to attorn.

3. He ſhall have not aid of the perſon in reverſion; becauſe he having originally the inheritance by the firſt gift, has likewiſe the cuſtody of the writings which are neceſſary to defend it.

4. Upon his alienation, no writ of entry *in conſimili caſu* lies.

5. After his death, no writ of intruſion lies.

6. He may join the miſe in a writ of right, in a ſpecial manner.

7. In a *præcipe* brought by him, he ſhall not name himſelf tenant for life.

8. In a *præcipe* brought againſt him, he ſhall not be named barely tenant for life.

§ 9. There

§ 9. There are, however, four qualities annexed to an eſtate tail after poſſibility of iſſue extinct, which prove this eſtate to be, in ſome reſpects, no more than an eſtate for life.

And others of a bare Eſtate for Life.

1. If the tenant makes a feoffment in fee, this is a forfeiture; becauſe having no longer a deſcendible eſtate in him, he cannot transfer it to another, without the prejudice and diſheriſon of the perſon in remainder.

2. If an eſtate in fee or in tail deſcends upon him, the eſtate tail after poſſibility of iſſue extinct is merged.

3. If he is impleaded and makes default, the perſon in reverſion ſhall be received, as upon the default of any other tenant for life.

4. An exchange between tenant in tail after poſſibility of iſſue extinct, and a bare tenant for life, is good; for, with reſpect to duration, their eſtates are equal.

§ 10. Although tenant in tail after poſſibility of iſſue extinct has a power of committing waſte, by the common law; yet the Court of Chancery, following the rule adopted in the caſe of tenant for life, without impeachment of waſte, will reſtrain perſons, ſeiſed of this kind of eſtate, from pulling down houſes, cutting down trees planted for ſhelter or ornament; or any other kind of malicious waſte.

This Tenant is reſtrained from malicious Waſte. Vide Tit. 3. ſ. 62.

Abraham v. Bubb, 2 Freem. R. 53. 2 Show. Rep. 68.

§ 11. A woman, being tenant in tail after poſſibility, and having married again, her ſecond huſband felled ſome trees in a grove that grew near, and was an ornament to the manſion houſe, and having an intent to fell the reſt, the perſon in remainder preferred his bill, to reſtrain her from felling thoſe trees, and to have an injunction to ſtay the committing of waſte. The caſe, after long argument, was referred; but the Lord Chancellor diſcovered his inclination *fortiter* for granting an injunction. And in a ſubſequent caſe of the ſame kind, an injunction was granted.

Anon. 2 Freem. R. 278.

Cook v. Whaley, 1 Ab. Eq. 400.

§ 12. On a motion for an injunction to ſtay a jointreſs, tenant in tail after poſſibility, from committing waſte, it was urged, that ſhe, being a jointreſs within the ſtatute 11 *Hen.* 7., ought in equity to be reſtrained from cutting timber, that being part of the inheritance, which by the ſtatute ſhe is reſtrained from aliening. And the Court granted an injunction againſt wilful waſte in the ſcite of the houſe, and pulling down houſes.

His Privileges cannot be granted over. 1 Inſt. 28 *a.*

§ 13. The privileges which a tenant in tail after poſſibility of iſſue extinct enjoys over a bare tenant for life, ariſe from the privity of eſtate, and becauſe the inheritance was once in him: he cannot, therefore, grant them over to another, ſo that his grantee will be but bare tenant for life.

Aprice's caſe, 3 Leon. 241.

§ 14. Thus, where a tenant in tail after poſſibility of iſſue extinct granted over his eſtate to another, the grantee

grantee was compelled to attorn, as a bare tenant for life; and ſo to be named in a writ of *quid juris clamat:* for, although it were true that a tenant in tail after poſſibility of iſſue extinct, was not compellable to attorn, yet that was a privilege annexed to his perſon, and not to the eſtate; but, by the aſſignment, the privity was altered, and the privilege gone.

TITLE V.

CURTESY.

CHAP. I.

Origin of Eſtates by the Curteſy, and Circumſtances required to their Exiſtence.

CHAP. II.

Of what Things a Man may be Tenant by the Curteſy, and of the Nature of this Eſtate.

CHAP. I.

Origin of Eſtates by the Curteſy, and Circumſtances required to their Exiſtence.

§ 1. *Origin of Curteſy.*
6. *Deſcription of.*
8. *Circumſtances neceſſary.*
9. *Marriage.*
10. *Seiſin.*
19. *Iſſue.*
§ 20. *It muſt be born alive.*
22. *And capable of inheriting the Eſtate.*
26. *Death of the Wife.*
27. *Who may be Tenants by the Curteſy.*

Section 1.

Origin of Curteſy.

THE ſecond eſtate for life derived from the common law, is that which a huſband acquires in his wife's lands after her death; and is called *an Eſtate by the Curteſy of England.* *Littleton* ſays, that this eſtate is

is ſo called, becauſe it is peculiar to *England*; but this is clearly a miſtake; for the cuſtom, that a huſband ſhould retain the lands of his deceaſed wife, prevailed among the northern nations long before it was adopted in *England*.

§ 2. Among the laws of the *Almains* or *Germans*, by which the inhabitants of the northern parts of *France* were governed, is the following: "*Si qua mu-* "*lier quæ hæreditatem paternam habet, poſt nuptum* "*pregnans peperit puerum, et in ipſa hora mortua fuerit,* "*et infans vivus remanſerit aliquanto ſpatio, vel unius* "*horæ, ut poſſit aperire oculos, et videre culmen domus,* "*et quatuor parietes, et poſtea defunctus fuerit, hære-* "*ditas materna ad patrem ejus pertineat.*" Lindebrog Ll. Aleman. Tit. 92. Baluz. vol. 1. p. 82.

§ 3. When the cuſtoms of the *Normans* were reduced into writing, this law was inſerted among them, and is thus expreſſed in the *Latin* tranſlation of the grand *Couſtumier*. "*Conſuetudo enim in Normania ex anti-* "*quitate approbata, quod ſi quis uxorem habuerit ex* "*qua hæredem aliquam procreaverit, quem natum vivum* "*fuiſſe conſtiterit, ſive vivat, ſive deceſſerit, totum feo-* "*dum quod maritus poſſidebat, ex parte uxoris ſuæ, tem-* "*pore quo deceſſerit, ipſi marito, quamdiu ab aliis ceſſa-* "*bit nuptiis, remanebit.*" Cha. 121.

§ 4. There can be no doubt, but that this cuſtom was firſt introduced into *England* by the *Norman* conqueror, or ſome of his immediate deſcendants; as no traces of it are to be found in the *Engliſh* law, prior to the eſtabliſhment of the *Normans*.

It

Pa. 15. It is ſaid, in *Horne's Mirror*, to have been introduced by *Hen.* 1. It was certainly well known in the time of *Hen.* 2., as there is a full account of it in the treatiſe that bears the name of *Glanville*, which was written in the 34th or 35th of that prince's reign.

Lib. 7. c. 18. Bract. 437 *b.*

§ 5. Lord *Hale*, in his hiſtory of the common law, c. 9., mentions, that *Hen.* 3. ſent a writ to *Ireland* for the purpoſe of eſtabliſhing the law reſpecting curteſy, in which it is thus explained: " *Cum igitur conſuetudo* " *et lex Angliæ fuerit, quod ſi aliquis deſponſaverit ali-* " *quam mulierem, ſive viduam, ſive aliam, hæreditatem* " *habentem, et ipſe poſtmodum ex ea prolem ſuſcitaverit,* " *cujus clamor auditus fuerit infra quatuor parietes,* " *idem vir, ſi ſupervixerit ipſam uxorem ſuam, habebit* " *tota vita ſua cuſtodiam hæreditatis uxoris ſuæ, licet ea* " *forte habuerit hæredem de primo viro ſuo qui fuerit* " *plenæ ætatis.*"

Deſcription of.

§ 6. An eſtate by the curteſy of *England* is thus deſcribed by *Littleton*, § 35.: " Where a man taketh " a wife ſeiſed in fee-ſimple, or in fee-tail general, or " ſeiſed as heir in ſpecial tail, and hath iſſue by the " ſame wife, male or female born alive, albeit the " iſſue after dieth or liveth, yet, if the wife dies, the " huſband ſhall hold the land during his life, by the " law of *England.*"

Gavelkind. Curteſy. Robinſon's Gav. 136.

§ 7. By the cuſtom of *Gavelkind*, a huſband who ſurvives his wife, is entitled to a moiety of his wife's lands, whether he has iſſue or not; but which, in conformity

conformity to the cuſtom of *Normandy*, he can only hold ſo long as he continues unmarried.

§ 8. *Littleton*'s deſcription of curteſy points out four circumſtances, as abſolutely neceſſary to the exiſtence of this eſtate: namely, marriage, ſeiſin of the wife, iſſue, and death of the wife. Circumſtances neceſſary.

§ 9. As to the marriage, it muſt be ſtrictly legal; that is, it muſt be between perſons capable, by the laws of *England*, of contracting matrimony together; and the ceremony muſt be performed according to the rules of the church, and the laws of the realm. Marriage.

It ſhould, however, be obſerved, that although where a marriage is *ipſo facto* void, the huſband does not acquire a title to curteſy; yet, if the marriage is only voidable, and is not annulled during the life of the wife, the huſband will be tenant by the curteſy. For no marriage is voidable by the eccleſiaſtical courts after the death of either of the parties. 2 Burn's Ec. Law, 458.

With reſpect to the mode of proving the fact of marriage, it will be ſtated in Title 6., Dower.

§ 10. As to the ſeiſin of the wife, or of the huſband in right of his wife, it is a circumſtance abſolutely neceſſary; and with reſpect to coporeal hereditaments, there muſt be a ſeiſin in deed, to entitle the huſband to curteſy. Thus, Lord *Coke* ſays: "If a man dieth "ſeiſed of lands in fee-ſimple, or fee-tail general, "and thoſe lands deſcend to his daughter, and ſhe "taketh Seiſin. 1 Inſt. 29 *a*.

" taketh huſband and hath iſſue, and dieth before any " entry, the huſband ſhall not be tenant by the " curteſy; and yet, in this caſe, ſhe had a ſeiſin in " law; but if ſhe or her huſband had during her " life entered, he ſhould have been tenant by the " curteſy."

Perk. ſ. 430. Doct. & Stud. Dial. 2. c. 25.

It is ſaid, that, in a caſe of this kind, if the huſband had gone towards the land, and done every thing in his power to make an entry, it would not be ſufficient, unleſs he actually entered during the life of his wife.

§ 11. The time when the ſeiſin of the wife commences, whether before, or after iſſue had, is immaterial. Thus, Lord *Coke* ſays, if a man takes a woman ſeiſed of lands in fee, and is diſſeiſed, and then has iſſue, and the wife dies, he ſhall enter and hold by the curteſy. So, if he has iſſue which dieth before the deſcent of lands on his wife.

1 Inſt. 30 *a.*

1 Inſt. 29 *b.* n. 3.

§ 12. Lord *Coke* ſays, that if a woman tenant in tail general, makes a feoffment in fee, and takes back an eſtate in fee, and marries, has iſſue, and dies, the iſſue may, in a *formedon*, recover the land againſt his father; becauſe he is to recover by force of the eſtate tail as heir to his mother, and is not inheritable to his father.

Mr. *Hargrave* has obſerved upon this paſſage, that the huſband could not have curteſy in reſpect of the fee, becauſe that was defeated by the ſon's recovery in

the formedon; nor in reſpect of the tail, becauſe the wife's feoffment before the marriage had diſcontinued it, and, conſequently, there could be no ſeiſin of it during the marriage.

§ 13. It has been already ſtated, that the poſſeſſion of a leſſee for years, is the poſſeſſion of the perſon to whom the inheritance deſcends, even before the receipt of rent: ſo that, if lands let for years, deſcend upon a married woman, although ſhe lives beyond the day on which the rent becomes due, without receiving it, yet her huſband will be entitled to curteſy. Tit. 1. ſ. 39.

§ 14. On the death of *H. Sewell*, an eſtate tail deſcended to his ſiſter *Alice Richardſon*, who was married, and had iſſue. The eſtate was let on leaſes for years, and the rents were payable at *Michaelmas* and *Lady Day*; but the tenants were greatly in arrear at the death of *H. Sewell*. De Gray, v. Richardſon, 3 Atk. 469.

Alice Richardſon did not receive any of the *Lady Day* rents, though ſhe lived four months after that time, nor did any other perſon receive rent during her life.

The queſtion was, whether her huſband was entitled to be tenant by the curteſy.

Lord *Hardwicke* obſerved, that the poſſeſſion of the leſſee for years being the poſſeſſion of the brother, he died ſeiſed; and his ſiſter became alſo ſeiſed, immediately on his death. If ſhe had died before *Lady Day*, there

there would not have been a doubt of the huſband's right to curteſy, becauſe he could do nothing until
1 Inſt. 15 *a.* the rent became due. And Lord *Coke* ſays, if lands let for years deſcend on an elder brother, who dies before entry or receipt of rent, yet he has ſuch a ſeiſin or *poſſeſſio fratris*, as will make the eſtate deſcend to
Vide Tit. 29. a ſiſter of the whole blood, in excluſion of a younger brother of the half-blood, becauſe the poſſeſſion of the leſſee for years is the poſſeſſion of the elder brother, ſo that he is actually ſeiſed of the inheritance: and the caſe of half-blood is conſtrued more ſtrictly than that of curteſy. The only objection ariſes in the neglect of the huſband in not diſtraining for the rent, which became due at *Lady Day*. The receipt of rent would have amounted to an actual ſeiſin; and if the repreſentatives of the brother had received any rent during the life of the wife, it would have been a material objection, but no part of the rent which accrued after the death of the brother was ever received by the wife, or by any other perſon; ſo that the poſſeſſion of the leſſee was the poſſeſſion of the wife, nor could there be any other, without making the huſband a treſpaſſer.

It was decreed, that the huſband was entitled to be tenant by the curteſy.

Tit. 3. f. 8. § 15. It has alſo been ſtated, that a deviſe to executors for payment of debts, does not prevent the deſcent of the freehold and inheritance: from whence, it follows, that in a caſe of this kind, the huſband will be entitled to curteſy.

§ 16. A perſon

§ 16. A perſon who had iſſue a daughter, deviſed his lands to his executors for the payment of his debts, and until his debts were paid. The executors entered. The daughter married, had iſſue, and died. It was reſolved that the huſband ſhould be tenant by the curteſy. Guavara's caſe, cited, 8 Rep. 96 *a*.

§ 17. Where the eſtate of the wife is let for life before the marriage, the huſband cannot acquire a ſeiſin thereof, and will not therefore be entitled to curteſy. If a rent is reſerved, it ſeems doubtful whether the huſband will be entitled to it; for, in a ſimilar caſe, Lord *Coke* was of opinion that the wife ſhould not have dower. 1 Inſt. 29 *a*. Vide Tit. 6.

§ 18. With reſpect to the ſeiſin which is neceſſary in incorporeal hereditaments to give a title to curteſy, it will be ſtated under Title 21. Advowſon, and the ſubſequent titles.

§ 19. The third circumſtance required to the exiſtence of an eſtate by the curteſy, is iſſue; after which, the huſband was formerly allowed to do homage alone, and was called tenant by the curteſy initiate. Such iſſue muſt, however, have the following qualities to entitle the huſband to curteſy: 1ſt, It muſt be born alive; 2d, It muſt be born in the life-time of the mother; and, 3d, It muſt be capable of inheriting the eſtate. Iſſue. 1 Inſt. 30 *a*. 67 *a*.

§ 20. By the old law, it was deemed neceſſary that the child ſhould be heard to cry; and this circumſtance It muſt be born alive. Bract. 438 *a*.

was

was to be proved by perſons who actually heard it, and not by thoſe who learned it from hearſay only. *Littleton* appears, however, to have doubted, whether it was neceſſary to prove that the child cried. And Lord *Coke* deduces an argument from the form of pleading in caſes of this kind, to prove, that it would be ſufficient to give any other evidence of the child's being born alive.

1 Inſt. 29 *b.*
8 Rep. 34 *b.*
Dyer, 25 *b.*
Beal. R. 25.

In the Life-time of the Wife.

§ 21. The iſſue muſt be born in the life-time of the wife. So that, if the wife dies in childbed, and the iſſue is taken out of the womb by the Cæſarean operation, the huſband will not be entitled to curteſy. For, at the inſtant of the mother's death, he was clearly not entitled, as having had no iſſue born; but the land deſcended to the child, while in his mother's womb; and the eſtate being once ſo veſted, ſhall not be taken from him.

1 Inſt. 29 *b.*
8 Rep. 35 *a.*

And capable of inheriting the Eſtate.

§ 22. The iſſue muſt be ſuch as is capable of inheriting the eſtate. So that, if lands are given to a woman and the heirs male of her body, and ſhe has iſſue a daughter only, and dies, her huſband will not be tenant by the curteſy.

Lit. ſ. 52.
1 Inſt. 29 *b.*
8 Rep. 35 *b.*

§ 23. If the wife be attainted of felony after ſhe has had iſſue, ſo that the iſſue cannot inherit from her, yet her huſband ſhall be tenant by the curteſy, in reſpect of the iſſue which he had before the attainder, which, by poſſibility, might have inherited. But if the wife had been attainted of felony before iſſue, although

1 Inſt. 40 *a.*

although ſhe had iſſue afterwards, yet her huſband would not be entitled to curteſy.

§ 24. It is a rule of law, that no perſon can be heir to an anceſtor who was not actually ſeiſed; hence, probably, aroſe the rule, which requires an actual ſeiſin in the wife; for without ſuch an actual ſeiſin, her iſſue would not be capable of inheriting from her. Tit. 29. 8 Rep. 36 *a.*

§ 25. The time when the iſſue is born, whether before or after ſeiſin, is immaterial. Thus, if after iſſue, lands deſcend to the wife, be the iſſue dead or alive at the time of the deſcent, the huſband ſhall be tenant by the curteſy. So, if after the death of the iſſue, the wife purchaſes lands in fee, and dies without having had any other iſſue, her huſband ſhall be tenant by the curteſy; for the having iſſue, and being ſeiſed during the coverture, is ſufficient, though it be at ſeveral times. 8 Rep. 35 *b.* 13 Rep. 23.

§ 26. The laſt circumſtance neceſſary to give a title to curteſy, is the death of the wife; by which, the eſtate of the huſband becomes conſummate. Death of the Wife.

§ 27. As to the perſons who are capable of acquiring an eſtate by the curteſy, it will be ſufficient to obſerve, that all thoſe who are allowed, by the laws of *England*, to acquire and hold lands and tenements, may be tenants by the curteſy. But an alien cannot be tenant by the curteſy. For although an alien may take an eſtate by purchaſe, for the benefit of the king, Who may be Tenants by the Curteſy. 7 Rep. 25 *a.* Calvin's caſe. 1 Vent. 417.

yet he cannot take an eſtate by act of law. For the law will not transfer an eſtate to a perſon who cannot keep it, but muſt immediately give title to another.

§ 28. If an alien be made a denizen, and afterwards has iſſue, he may be tenant by the curteſy in reſpect to ſuch iſſue had after denization; but would not be entitled on account of iſſue had before.

TITLE

TITLE V.

CURTESY.

CHAP. II.

Of what Things a Man may be Tenant by the Curteſy, and of the Nature of this Eſtate.

§ 1. *Originally confined to the Maritagium of the Wife.*
2. *Afterwards extended to all Eſtates in Fee.*
7. *Eſtates Tail.*
15. *Eſtates in Common but not in Joint-Tenancy.*
16. *Truſt Eſtates.*
17. *Money to be laid out in Land.*
20. *Equities of Redemption.*
21. *Incorporeal Hereditaments.*
§ 22. *What Things are not liable to Curteſy.*
23. *Eſtates not of Inheritance.*
26. *Lands aſſigned in Dower.*
27. *Copyhold Eſtates.*
28. *Nature of this Eſtate.*
32. *Puniſhable for Waſte.*
34. *Subject to the Charges of the Wife.*
36. *Forfeitable for Alienation.*
37. *But not for Adultery.*

Section 1.

Originally confined to the Maritagium of the Wife.

WITH reſpect to the things of which a man may have an eſtate by the curteſy, it appears from *Glanville*, that this right was originally confined to the *maritagium* of the wife. " *Cum quis itaque terram* " *aliquam cum uxore ſua in maritagium ceperit, ſi* " *exeadem uxore ſua hæredem habuerit filium, vel* " *filiam clamantem et auditum infra quatuor parietes,* " *ſi idem vir uxorem ſuam ſupervixerit, ſive vixerit* " *hæres ſive non, illi in vita ſua remanet maritagium* " *illud.*" Glanv. lib. 7. c. 18.

can be no doubt, however, but that the huſband of a woman, *donee* in ſpecial tail, would alſo be entitled to curteſy.

§ 10. It was formerly doubted, whether a man could be tenant by the curteſy of an eſtate tail after failure of iſſue capable of inheriting the eſtate, by which the eſtate tail was in fact determined, and the donor's right to the reverſion accrued. But it was determined, in the reign of queen *Elizabeth*, that in a caſe of this kind, the huſband ſhould have his curteſy.

Paine's caſe, 8 Rep. 34.

§ 11. A man having iſſue two daughters, gave lands to the elder, and the heirs of her body, remainder to the younger, and the heirs of her body. The elder daughter married, and had iſſue born alive, that died; and afterwards the elder daughter herſelf died. The younger daughter entered upon the huſband of the elder, who claimed to be tenant by the curteſy. It was objected, that the huſband of the elder ſhould not, in this caſe, be tenant by the curteſy, becauſe the eſtate of the wife was determined; and the eſtate of the huſband, which was derived out of that of the wife, could not continue longer than the primitive eſtate endured, for *ceſſante ſtatu primitivo, ceſſat derivativus*. But it was anſwered and reſolved by the whole court, that, at common law, if lands had been given to a woman and the heirs of her body, and ſhe had taken a huſband and had iſſue, and the iſſue died, and the wife alſo died without iſſue, whereby the inheritance of the land did revert to the donor, in that caſe

caſe the eſtate of the wife was determined, and yet the huſband ſhould be tenant by the curteſy, for that was *tacitè* implied in the gift. And therefore, that the huſband was entitled in this caſe to hold the eſtate tail during his life as tenant by the curteſy; for the eſtate by the curteſy was not derived merely out of the eſtate of the wife, but was given to the huſband by the privilege and benefit of the law; for as ſoon as the huſband had iſſue, his title became initiate, and could not afterwards be defeated by the death of the iſſue, which being the act of God, ought not to turn to his prejudice. Doct. & Stud. c. 28.

§ 12. If a woman, who is tenant in tail, departs with her eſtate ſo as to reduce herſelf to be only tenant for life, and afterwards marries, her huſband will not be entitled to an eſtate by the curteſy.

§ 13. A woman tenant in tail, previous to her marriage, conveyed her eſtate, by leaſe and releaſe, to truſtees to the uſe of herſelf till the marriage, then to the huſband for life, remainder to herſelf for life, remainder to the firſt and other ſons of the marriage. The woman died in the life-time of her huſband; and it was determined, that the huſband could not take as tenant by the curteſy, becauſe, the inſtant the marriage took effect, the eſtate was veſted in the huſband during the joint lives of himſelf and his wife, and, conſequently, there never was one moment during the coverture, when the wife was ſeiſed of an eſtate tail in poſſeſſion, which is neceſſary in order to make the huſband tenant by the curteſy. Doe v. Rivers, 7 Term R. 276. Vide Tit. 2, Ch. 2. ſ. 22. Vide Tit. 6.

1 Inſt. 224 *a.* 6 Rep. 41 *a.*

§ 14. Curteſy is an incident ſo inſeparably annexed to an eſtate tail, that it cannot be reſtrained by any proviſo or condition whatever.

Eſtates in Common but not Joint-tenancy.

§ 15. A man may be tenant by the curteſy of eſtates in coparcenary and in common, but not of eſtates in joint tenancy; of which, an account will be given under thoſe titles.

Truſt Eſtates.

§ 16. Truſt eſtates are liable to curteſy, and the Court of Chancery will aſſiſt a tenant by the curteſy in removing a truſt term for years; of which, notice will be taken under Title 12. Truſts.

Money to be laid out in Land. Tit. 1. ſ. 15.

§ 17. It has been ſtated to be a rule in equity, that, money agreed to be laid out in the purchaſe of land, ſhall be conſidered as land to all intents and purpoſes: and upon this principle it has been determined, that a man may be tenant by the curteſy of money agreed to be laid out in the purchaſe of land.

Sweetapple v. Bindon, 2 Vern. 536.

§ 18. A perſon deviſed 300 l. to her daughter *Mary*, to be laid out by her executrix in the purchaſe of lands, and ſettled to the only uſe of her daughter *Mary*, and her children: and if ſhe died without iſſue, the lands to be equally divided between her brothers and ſiſters.

The plaintiff married *Mary* the legatee, and had iſſue by her; but ſhe and her children being dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in

the purchaſe of land, and ſettled on him for life as tenant by the curteſy, or might have the intereſt of the money during his life. The court obſerved, that, if this had been an immediate deviſe of land, *Mary* the daughter would have been tenant in tail, and, conſequently, the huſband would have been tenant by the curteſy. It was therefore decreed, that the money ſhould be conſidered as land, and that the plaintiff ſhould have the intereſt and produce thereof, during his life, as tenant by the curteſy.

§ 19. A ſum of money was agreed, by marriage articles, to be laid out in the purchaſe of lands, to be ſettled to the uſe of the huſband and wife for life, remainder to the children as they ſhould appoint, and if but one child, then to that child, in tail. The marriage took place, and there was but one child, a daughter, who married; and the truſtee paid the money to her, and her huſband. It was decreed, that this payment was not ſufficient to make it be conſidered as money, but that the huſband ſhould be tenant by the curteſy of it.

Cunningham v. Moody. 1 Veſ. 174.

Dodſon v. Hay, S. P. 3 Bro. Rep. 404.

§ 20. An equity of redemption is ſubject to curteſy; of which an account will be given in Title Mortgage.

Equities of Redemption.

§ 21. Some incorporeal hereditaments, ſuch as advowſons, tythes, commons, and rents, are liable to curteſy; of which an account will be given under thoſe reſpective titles.

Incorporeal Hereditaments.

§ 22. Having

What Things are not liable to Curteſy.

§ 22. Having ſtated the different kinds of property which are liable to curteſy, it will now be proper to examine what things are not ſubject to this right.

Eſtates not of Inheritance.

§ 23. No intereſts in land are ſubject to curteſy but eſtates of inheritance, in poſſeſſion. For an eſtate by the curteſy is a continuation of the inheritance; and, therefore, there can be no tenancy by the curteſy, unleſs the children take an inheritance. For it is abſolutely neceſſary that the moment the huſband takes as tenant by the curteſy, the inheritance ſhould deſcend upon the children.

Boothby v. Vernon, 9 Mod. 147.

§ 24. Lands were deviſed to *Ann Boothby* and her aſſigns for her life, and if ſhe married and had iſſue male of her body, living at the time of her death, then to ſuch iſſue male, and his heirs male for ever. *Ann Boothby* married and had iſſue, and died in the life-time of her huſband. It was determined, that the inheritance, never having been veſted in the wife, during her life, her huſband could not, for that reaſon be tenant by the curteſy.

Sumner v. Partridge, 2 Atk. 47.

§ 25. Lands were deviſed to *A.* and her heirs, and if ſhe died before her huſband, he to have 20 *l.* a year for life, remainder to go to the children. The wife died before her huſband. The Court ſaid, it was a rule in the caſe of a tenancy by the curteſy, that the eſtate ſhall come out of the inheritance, and not out of the freehold; and, therefore, the huſband was not entitled to curteſy.

§ 26. A perſon

§ 26. A perſon cannot be tenant by the curteſy of lands which are aſſigned to a woman for her dower, of which the reaſon will be given in the next title.

Lands aſſigned in Dower. Bro. Ab. Tit. Tenant by the Curteſy, 10.

§ 27. Copyhold eſtates are not liable to curteſy by the common law. But there are many manors in which the huſband of a female copyholder is by particular cuſtom entitled to his wife's eſtate, in caſe he ſurvives her; of which an account will be given under the Title Copyhold.

Copyhold Eſtates. Gilb. Ten. 160.

It ſhould, however, be obſerved, that a man may be tenant by the curteſy of the rents and ſervices due for copyholds, where his wife was ſeiſed of the manor (*a*).

§ 28. With reſpect to the nature of this eſtate, it is no more than a bare eſtate for life; nor has the tenant any more privileges than a mere tenant for life. And by the cuſtom of *Normandy*, it was determinable upon the marriage of the tenant, which is ſtill the caſe in gavelkind lands.

Nature of this Eſtate.

§ 29. An eſtate by the curteſy is conſidered, in many reſpects, as a continuation of the wife's eſtate; and, therefore, the huſband is entitled to all thoſe rights and privileges which his wife would have had if ſhe were alive, and which were annexed to her eſtate.

3 Rep. 22 *b*.

(*a*) With reſpect to the caſes where curteſy ceaſes with the eſtate, they will be ſtated in Title-vi. Dower.

§ 30. No.

§ 30. No entry is neceſſary to complete this eſtate; for, on the death of the wife, the law adjudges the freehold to be in the huſband immediately, as tenant by the curteſy.

8 Rep. 36 *a.* 2 Inſt. 301.

§ 31. The tenant by the curteſy ſhall be attendant on the lord paramount for the ſervices which are due in reſpect to the lands which he holds by this title.

Puniſhable for Waſte.

2 Inſt. 145. 301. 353.

§ 32. It appears to have been ſomewhat doubtful, whether a tenant by the curteſy was puniſhable at common law for waſte. And, therefore, it was enacted by the ſtatute of *Glouceſter*, 6 *Edw.* 1. c. 5. that a writ of waſte ſhould lie againſt him, and that he ſhould incur the ſame penalties for committing waſte, as any other tenant for life.

2 Inſt. 301. 2 Bac. Ab. 230. Fitz. N. B. 56.

§ 33. There is ſuch a privity between tenant by the curteſy and the heir, that at common law, although both had as it were by conſent granted away their eſtates, yet no action of waſte would lie againſt any other perſon. But now, by the ſtatute of *Glouceſter*, c. 5. a remedy is provided for the grantee of the reverſion, againſt the tenant by the curteſy, ſo long as he continues his eſtate; or againſt his aſſignee, if he aſſigns it over. But ſo long as the heir keeps his reverſion, the tenant by the curteſy is liable to his action of waſte, notwithſtanding any aſſignment; the ſtatute having provided no remedy for this caſe.

Vide 1 Inſt. 57 *a.* n. 1.

It ſeems to be ſomewhat doubtful, whether tenant by the curteſy is within the ſtatute 6 *Ann.* c. 31. reſpecting accidental fire.

§ 34. An

§ 34. An eſtate by the curteſy is ſubject to the charges of the wife; ſo that if a woman, tenant in tail, acknowledges a ſtatute, and afterwards marries, has iſſue, and dies, the lands may be extended in the hands of the huſband holding as tenant by the curteſy.

Subject to the Charges of the Wife.

Dyer, 51 *b*. n.

§ 35. Where an eſtate, of which a man is tenant by the curteſy, is charged with the payment of a ſum of money, the perſon entitled to the inheritance can oblige the tenant by the curteſy to keep down the intereſt, as well as any other tenant for life.

1 Atk. 606.

§ 36. If a tenant by the curteſy aliens in fee, or in tail, or for the life of the grantee, it is a forfeiture of his eſtate; and the perſon in reverſion may, by the ſtatute of *Weſtminſter* 2. c. 24. have a writ of entry *in conſimili caſu*.

Forfeitable by Alienation.

2 Inſt. 309.

§ 37. A huſband does not forfeit his right to an eſtate by the curteſy, by leaving his wife and living in adultery with another woman.

But not for Adultery.

3 P. Wms. 276.

Vide Tit. 6.

TITLE

TITLE VI.

DOWER.

CHAP. I.

Of the Origin and different Kinds of Dower.

CHAP. II.

Of the Requiſites to complete the Title to Dower, and the Perſons entitled to it.

CHAP. III.

Of what Things a Woman is dowable, and the Nature of this Eſtate.

CHAP. IV.

Of the Aſſignment of Dower, and the Modes of recovering it.

CHAP. V.

By what Means Dower may be barred.

CHAP. I.

Of the Origin and different Kinds of Dower.

§ 2. *Origin of Dower.*
11. *Dower at Common Law.*
12. *Dower by Cuſtom.*
16. *Dower ad Oſtium Eccleſiæ.*
§ 18. *Dower ex Aſſenſu Patris.*
20. *Dower de la plus Belle.*
21. *Dower is a moral Right.*

Section 1.

THE third eſtate for life derived from the law, is that which a widow acquires in a certain portion of her huſband's lands, tenements, and hereditaments,

iments, after his death, for her ſupport and maintenance; which is called *Dower.*

§ 2. Dower, like many of our other ancient cuſtoms, is derived from the *Germans*, among whom it was a rule, that a virgin ſhould have no marriage portion, but that her huſband ſhould allot a part of his property for her maintenance, in caſe ſhe ſurvived him. "*Dotem non uxor marito, ſed uxori maritus* "*offert.*" When the *Germans* eſtabliſhed themſelves in the ſouthern parts of *Europe*, and reduced their cuſtoms into writing, they fixed the quantity of property, which a huſband was allowed to allot to his wife, for her dower. The *Longobardic* code directed, that it ſhould conſiſt of a fourth part of the huſband's eſtate; the *Gothic*, of a tenth; and, in proceſs of time, regular forms were invented for the purpoſe of conſtituting dower, of which, a great many have been collected by the *French* antiquaries.

Origin of Dower.

Tacitus de Mor. Ger. 18.

Du Cange voce Dos, Baluz. V. 2. 414. 937.

Marculphi Form. lib. 2. c. 15.

§ 3. As women were not originally capable of poſſeſſing feuds, on account of their inability to perform military ſervices, it followed, that a woman could not be endowed of a feud: but this circumſtance was not productive of much inconvenience; for, when feuds were firſt introduced, the quantity of allodial property was ſo great, that lands held by that tenure were not wanting for the endowment of women. And in moſt of the old charters conſtituting dower, it is expreſsly mentioned, that the land of which the wife is endowed, is allodial. An alteration, in this reſpect, was however made by the Emperor *Frederick* 2., who directed

Wright's Ten. 192. n.

directed that women ſhould be thenceforth endowed of feuds.

Ten. 193. § 4. Sir *Martin Wright* ſays; "We find no foot-"ſteps of dower in lands, until the time of the *Nor-*"*mans:* but, on the contrary, proviſion is made by "one of the laws of king *Edmund* for the ſupport of "the wife, ſurviving her huſband, out of his goods "only." This, however, appears to be a miſtake; 195. for, in the appendix to Mr. *Somner*'s *Treatiſe of Gavel-kind*, there is a *Saxon* charter, intituled, "*Chirogra-*"*phum pervetuſtum de nuptiis contrahendis, et dote* "*conſtituenda*," in which particular lands, together with thirty oxen, twenty cows, ten horſes, and ten bondmen, are appointed for the wife's dower.

§ 5. The notion of dower is by no means taken from the civil law; in which, *dos* ſignifies the portion which the wife brought the huſband; over which he only acquired a right of enjoyment, or *uſusfructus*, during the marriage, whether it conſiſted of land or moveables: and it reverted to the wife on his death. So that there was no impropriety in denying her a ſhare of her huſband's property. This law, though apparently juſt and ſimple, would not have ſuited the manners and ſituation of the northern nations. The *Romans* were an opulent and a civilized people, and, as the daughters were, by the *Roman* law, entitled to an equal portion with their brothers of their fathers and mothers property, it could ſeldom happen that a *Roman* virgin was entirely deſtitute of property; ſo that ſhe could not fail of a maintenance after her huſband's death:

death: whereas, we have ſeen that no portion was given to a *German* virgin in marriage; and, therefore, the only mode of providing a maintenance for widows, was, by giving them a right to a certain portion of their huſband's lands during their widowhood. As the relation of huſband and wife is the firſt that takes place in ſociety, it follows, that a reſemblance in the laws reſpecting marriage, and the rights acquired by it, is a ſtrong proof of a ſimilarity of origin. Now, it was the general cuſtom of all the nations who emigrated from *Germany*, that a woman ſhould bring no fortune in marriage, but ſhould acquire a right to ſome of her huſband's property, in caſe ſhe ſurvived him. This practice is to be found, not only in *Tacitus*, but alſo, in the codes of almoſt all the *German* nations. Whereas among the original inhabitants of *Gaul*, women uſually brought fortunes in marriage, and regular ſettlements were made on ſuch occaſions. Thus *Cæſar* ſays: "*Viri quantas pecunias ab uxoribus, dotis nomine* "*acceperunt, tantas ex ſuis bonis, æſtimatione facta,* "*cum dotibus communicant; hujus omnis pecuniæ con-* "*junctim ratio habetur, fructuſque ſervantur; uter* "*eorum vita ſuperavit ad eum pars utriuſque, cum* "*fructibus ſuperiorum temporum pervenit.*" It is alſo obſervable, that the cuſtom of dower was unknown in *England* until the arrival of the *Saxons*; for the *Welch* were unacquainted with it before the ſtatute of *Rutland*; nor was it eſtabliſhed among the *Iriſh*, until they adopted the *Engliſh* laws.

Hein. Elem. Jur. Germ. ch. 1. ſ. 5.

De Bello Gall. lib. 6. ſ. 18.

Davies Rep. 136.

§ 6. By the ancient cuſtoms of *Normandy*, widows were entitled to one-third of the fiefs whereof their

Grand Conſtumier, c. 101.

huſbands were ſeiſed at the time of their marriage; and no huſband could endow his wife of more than a third of his lands, though he might endow her of leſs.

§ 7. There is every reaſon to ſuppoſe, that, upon the eſtabliſhment of the *Normans* in *England*, their cuſtoms reſpecting dower were adopted; but it appears that, at this time, widows forfeited their dower by incontinency, or a ſecond marriage: for, by the charter of *Hen.* 1., the condition of widowhood and chaſtity was only required in caſes where there was iſſue.

Black. Tra. 286.

" *Et ſi mortuo viro, uxor ejus remanſerit et ſine liberis* " *fuerit, dotem ſuam, et maritationem habebit, et eam* " *non dabo marito niſi ſecundum velle ſuum. Si vero* " *uxor cum liberis remanſerit, dotem quidam et marita-* " *tionem habebit, dum corpus ſuum legitime ſervaverit, et* " *eam non dabo, niſi ſecundum velle ſuum.*"

§ 8. When *Glanville* wrote, which was in the reign of *Hen.* 2., the law of dower ſtood thus. Every man was bound, both by the civil and eccleſiaſtical law, to endow his wife at the time of his marriage, either by naming the dower in particular, or by endowing her generally, of all his lands. If he endowed her generally, then the wife was entitled to her *dos rationabilis*, which was one-third of her huſband's *liberum tenementum.* If he named a dower which amounted to more than a third, it was not allowed, but was reduced to a third. Nor was the wife entitled to a dower out of any of his future acquiſitions, unleſs he ſpecially engaged

Glanv. lib. 6. c. 1, 2, &c.

gaged before the prieſt, to endow her of them. And theſe regulations are exactly ſimilar to thoſe contained in the 101ſt chapter of the *Grand Conſtumier of Normandy.*

§ 9. Nothing is mentioned concerning dower in king *John's Magna Charta*, or the charter of *Hen.* 3. But in the charters of 1217 and 1224, it is provided, that dower ſhould conſiſt of a third part of all the lands which the huſband held during his life, unleſs the wife had, previous to her marriage, accepted a ſmaller portion of them. "*Aſſignetur antem ei, pro dote ſua,* 2 Inſt. 16. "*tertia pars totius terræ mariti ſui, quæ fuit ſua in vitâ* "*ſuâ, niſi de minori fuerit dotatâ ad oſtium eccleſiæ.*"

§ 10. The principle, that no perſon ſhould endow his wife of more than a third of his lands, was ſo ſtrictly adhered to, that the queen of *Navarre*, who was the widow of *Edmond* Duke of *Lancaſter*, brother of *Edward* 1., having petitioned parliament for more than a third part of her huſband's lands and hereditaments, in conſequence of a writing or deed executed by her huſhand, the following anſwer was given her: Rot. Parl. 26 Ed. 1. vol. 1. 143. "*Videtur conſilio nunc hic exiſtenti quod regina Navarr'* "*non poteſt plus habere pro dote ſua, ſecundum uſa-* "*gium et conſuetudinem regni, niſi tertiam partem ter-* "*rarum unde dominus ſuus fuit ſciſitus in dominico ſuo* "*ut de feodo, die quo ipſam deſponſavit, aut poſtea, qua-* "*lecunque factum oſtendat,*" &c.

§ 11. There are now ſubſiſting four ſorts of dower; the firſt is dower by the common law, which appears, Dower at Common Law.

from what has been above ſtated, to have been finally eſtabliſhed by magna charta; and is thus defined by *Littleton*, ſ. 36. "Tenant in dower is where a man is "ſeiſed of certain lands or tenements in fee-ſimple, fee "tail general, or as heir in ſpecial tail, and taketh a "wife and dieth: the wife, after the deceaſe of her "huſband, ſhall be endowed of a third part of ſuch "lands and tenements as were her huſband's at "any time during the coverture; to have and to "hold to the ſame wife in ſeveralty by metes and "bounds for term of her life, whether ſhe hath iſſue "by her huſband or no, and of what age ſoever the "wife be, ſo as that ſhe be paſt the age of nine years "at the time of the death of her huſband."

Dower by Cuſtom. 1 Inſt. 33 *b.*

§ 12. Dower by cuſtom, is where a widow becomes entitled to a certain portion of her huſband's lands, in conſequence of ſome local and peculiar cuſtom which prevails in the place where her huſband's lands are ſituated: and, in caſes of this kind, the wife cannot waive the proviſion thereby made for her and claim dower at common law; becauſe all cuſtoms are equally antient with the common law.

Rob. Gavel. 159.

Prerog. Regis 17 Ed. 2. St. 1. c. 16.

Lamb. Arch. 60.

§ 13. Thus, by the cuſtom of *Gavelkind*, the widow is entitled to a moiety of all the lands and tenements which her huſband held by that tenure for her dower. But it is forfeitable by a ſecond marriage, or by incontinence. And it is obſervable, that this ſpecies of dower is preciſely ſimilar to that which exiſted in the time of the *Anglo Saxons*.

§ 14. By

§ 14. By the cuſtom of *Burrough Engliſh*, the widow ſhall have the whole of her huſband's lands in dower. Lit. f. 37. 166.

§ 15. By the cuſtom of moſt manors of which lands are held by copy of court roll, the widows of copyholders are entitled to a certain part of their huſband's lands, as their dower or free-bench; of which, an account will be given in Title 10. Copyhold.

§ 16. Dower *ad oſtium eccleſiæ*, is where a man of full age, when he comes to the church-door, endows his wife of his whole land, or of the half, or other ſmaller part thereof; and doth declare the quantity and certainty of the land which ſhe ſhall have for her dower. Dower ad Oſtium Eccleſiæ. Lit. f. 39.

§ 17. This is, in all probability, the moſt antient ſpecies of dower; for *Bracton* ſays, 92 *a*. "*Et ſcien-*"*dum eſt, id quod liber homo dat ſponſæ ſuæ ad oſtium* "*eccleſiæ propter nuptias futuras, et onus matrimonii,* "*et ad ſuſtentationem uxoris et educationem liberorum* "*cum fuerint procreati, ſi vir præmoriatur.*" It is exactly ſimilar to the mode of endowment which was practiſed all over Europe during the tenth and eleventh centuries; and which prevailed in *England* when *Glanville* wrote.

§ 18. Dower *ex aſſenſu patris*, is only a ſpecies of dower *ad oſtium eccleſiæ*, made when the huſband's father is alive; and the ſon, with his conſent expreſsly Dower ex Aſſenſu Patris.

given, endows his wife at the church-door with a certain part of his father's lands.

Lit. ſ. 41.

§ 19. Theſe two laſt kinds of dower were not abſolutely binding on the wife, for ſhe might refuſe them after her huſband's death, and claim her dower at common law; which was probably the reaſon that they have fallen into total diſuſe.

Dower de la plus Belle. Lit. ſ. 48.

§ 20. There was another kind of dower, called *De la Plus Belle*, which was, where a man held lands by knight ſervice, and alſo in ſocage, and on his death the lord entered on the lands held by knight ſervice, as guardian in chivalry; and the widow occupied the lands held in ſocage, as guardian in ſocage. If, in ſuch caſe, the widow claimed dower out of the lands held by knight ſervice, the guardian in chivalry might pray that ſhe might be endowed *De la Plus Belle* of the lands held in ſocage, in order to prevent diſmembering the lands held by knight ſervice; which were appropriated to the defence of the realm.

The abolition of military tenures has, of courſe, put an end to this kind of dower.

Dower a Moral Right. 2 P. Wms. 702.

§ 21. A widow has not only a civil, but alſo, a moral right, to dower. Thus, Sir *Joſeph Jekyll* ſays: "The relation of huſband and wife, as it is the neareſt, "ſo it is the earlieſt; and, therefore, the wife is the "proper object of the care and kindneſs of the huſ-"band. The huſband is bound, by the law of God "and

" and man, to provide for her during her life; and, " after his death, the moral obligation is not at an " end; but he ought to take care of her proviſion " during her own life. This is the more reaſonable, " as, during the coverture, the wife can acquire no " property of her own. If, before her marriage, ſhe " had a real eſtate, this, by the coverture, ceaſes to " be hers, and the right thereto, while ſhe is married, " veſts in the huſband: her perſonal eſtate becomes " his abſolutely, or, at leaſt, is ſubject to his controul; " ſo that, unleſs ſhe has a real eſtate of her own, " (which is the caſe but of few), ſhe may by his death " be deſtitute of the neceſſaries of life, unleſs provided " for out of his eſtate, either by a jointure, or dower. " As to the huſband's perſonal eſtate, unleſs reſtrained " by ſpecial cuſtom, (which very rarely takes place), " he may give it all away from her; ſo that his real " eſtate, (if he has any), is the only plank ſhe can " lay hold of to prevent her ſinking under her diſtreſs. " Thus the wife is ſaid to have a moral right to " dower."

§ 22. Lord *Bacon*, in his reading in the ſtatute of uſes, ſays; " The tenant in dower is ſo much fa- " voured, as that it is the common bye-word in the " law, that the law favoureth three things; life, " liberty, and dower."

TITLE VI.

DOWER.

CHAP. II.

Of the Requiſites to complete the Title to Dower, and the Perſons entitled to it.

§ 1. *Requiſites to Dower.*
2. *Marriage.*
4. *How the Fact of Marriage muſt be tried.*
9. *Effects of Divorces.*
12. *Seiſin of the Huſband.*
27. *Death of the Huſband.*
§ 28. *Who may be endowed.*
29. *Who are incapable of having Dower.*
30. *Aliens.*
33. *Jeweſſes.*
34. *Women ſtolen.*

Section 1.

Requiſites to Dower.

LITTLETON's definition of dower points out three circumſtances as abſolutely neceſſary to its exiſtence; namely, marriage, ſeiſin, and death of the huſband.

Marriage.

§ 2. As to the marriage, it muſt be actually ſolemnized in the manner required by law, and between perſons capable of contracting matrimony together: for it is a maxim of law, "*ubi nullum matrimonium*, "*ibi nulla dos.*" But although a marriage be voidable, yet, if it be not avoided in the life-time of the huſband, his widow will be entitled to dower.

Perk. 304.
Tit. 5. ch. 1. ſ. 10.

§ 3. Although

§ 3. Although the marriage ſhould be had before the parties are of ſufficient age to conſent, yet Lord *Coke* ſays, that if the wife be paſt the age of nine years at the time of her huſband's death, ſhe ſhall be endowed, of what age ſoever her huſband be, although he were but four years old; wherein it is to be obſerved, that although *conſenſus non concubitus facit matrimonium*, and that a woman cannot conſent before twelve, nor a man before fourteen; yet this inchoate and imperfect marriage, (from which, either of the parties may at the age of conſent diſagree), ſhall entitle the wife to dower: and therefore it is accounted in law, after the death of the huſband, *legitimum matrimonium quoad dotem.*

1 Inſt. 33 *a.*

Dyer 369 *a.*

§ 4. The fact of marriage cannot, in actions for dower or curteſy, be tried by a jury, but only by the biſhop's certificate; upon the plea of *ne unques accouplé* in loyal matrimony: becauſe the direct juriſdiction over queſtions concerning the legality of marriage, ſpecially belongs to the eccleſiaſtical courts; and its ſentences on this head are, in general, concluſive to the temporal courts,

How the fact of Marriage muſt be tried.

Bract. 302 *a.* Dyer, 368 *b.*

§ 5. Where a biſhop certified, "*Quod copulata fuit* "*in vero matrimonio, ſed clandeſtino, et quod W. et E.* "*thori et menſæ participatione mutuo cohabitaverunt,* "*ad mortem prædicti W.*" It was reſolved that the certificate was good; for *vero matrimonio*, although *clandeſtino, copulati* is as good as *legitimo copulati matrimonio*, for they are all one by intendment; and although

Wickham v. Enfield, Cro. Car. 351.

though it be *clandeſtino*, yet it does not vitiate the marriage: and when it is added, *thori et menſæ participatione durante vita cohabitaverunt*, that proves they continued huſband and wife during his life. It was reſolved, in the ſame caſe, that neither the day or place of marriage need be mentioned in the biſhop's certificate, not being material nor iſſuable; the biſhop's certificate being concluſive.

§ 6. No replication is allowed to the plea of *ne unques accouplé* in loyal matrimony: nor can a ſentence of an eccleſiaſtical court be pleaded in proof of a marriage.

Robins v. Crutchley, 2 Wilſ. Rep. 122.

§ 7. In a writ of dower, the defendant pleaded two pleas: 1ſt. *Ne unques accouplé in loyal matrimonie et hoc*, &c. The demandant replied to the firſt plea, and ſet forth a ſentence of the eccleſiaſtical court, by which it was declared that ſhe was lawfully married. The defendant demurred to the replication of the demandant, to the plea of *ne unques accouplé*, and the plaintiff joined in demurrer.

Lord Chief Juſtice *Willes*.—" I am opinion, that " there can be no replication to a general iſſue to ouſt " a perſon of his legal trial. Here the biſhop has the " only right of trial, by his certificate to this court; " and if this replication be allowed, the biſhop will be " ouſted. A ſentence in a ſpiritual court is not a re- " cord, and if it comes in queſtion here, muſt be " tried by the country; neither is it final to the par- " ties,

" ties, for, (as *Oughton* ſays rightly), they may at any " time apply to have it reverſed: but the biſhop's " certificate is concluſive and final to all intents."

Clive, Juſtice.—" There never was a precedent of " ſuch a replication as this. I think *ne unques accouplé* " *in loyal matrimonie*, is a general iſſue; and ſuch a " replication as this cannot be allowed, for it endea- " vours to draw the trial to the country, which the " law doth not permit." Vide Harg. Tra. 454.

§ 8. It has been determined in a modern caſe, that the lawfulneſs of a marriage celebrated in *Scotland*, may be tried by a jury; and, therefore, that a replication to a plea of *ne unques accouplé*, &c. in a writ of dower, alleging a marriage in *Scotland*, may conclude to the country. Ilderton v. Ilderton, 2 H. Black. 145.

§ 9. A divorce *propter ſervitiam et metum* is no bar of dower, becauſe it does not diſſolve the bond of matrimony; but is only a permiſſion to the parties to live ſeparate, that the wife may be ſecure from the huſband's cruelty and ill uſage. But, in a caſe of this kind, a court of equity will not aſſiſt a widow in recovering her dower, but will leave her to her remedy at law. Effect of Divorces. 1 Inſt. 32 *a*. Shute v. Shute, Prec. in Cha. 111.

§ 10. Lord *Coke* ſays, that a divorce, *cauſa adulterii*, is no bar of dower, becauſe it does not diſſolve the marriage, but only ſeparates the parties, *a menſa et thoro*; and the marriage ſtill continues in force. *Roll*, in his Abridgement, ſays, that a divorce of this kind bars 1 Inſt. 32 *a*. n. 9. 2 Inſt. 435. 1 Roll. Ab. 68 *a*.

Noy, 108. Godb. 145.

bars dower; but Lady *Stowel*'s caſe is a direct authority in ſupport of Lord *Coke*'s aſſertion.

It is ſomewhat ſingular, that, in an age when adultery is become ſo common, this point ſhould be doubtful.

1 Inſt. 33 *a*.

§ 11. A divorce *cauſa præcontractus*, *cauſa conſanguinitatis*, *affinitatis*, or, *frigiditatis*, bars the wife of dower; for theſe diſſolve the *vinculum matrimonii*, and leave the parties at liberty to marry again. But if the huſband dies before a ſentence of divorce is pronounced, the wife will be entitled to dower; for the marriage being only voidable, and not actually avoided by ſentence, in the life-time of both the parties, it cannot be avoided afterwards; and, conſequently, the biſhop muſt certify that the parties were married.

Seiſin of the Huſband.

1 Inſt. 31 *a*. Lit. ſ. 448.

§ 12. The ſecond circumſtance required to the exiſtence of an eſtate in dower, is, that the huſband ſhould be ſeiſed ſome time during the coverture of thoſe things whereof the wife is dowable. But there is no neceſſity of a ſeiſin in fact, as in the caſe of curteſy; for a ſeiſin in law will be ſufficient, otherwiſe it

Perk. 366.

would be in the huſband's power, either by his negligence or malice, to defeat his wife of that ſubſiſtence after his death, which the law has provided for her; and ſhe cannot enter to gain a ſeiſin in her own right, as he may do into lands deſcended to her, in order to entitle himſelf to be tenant by the curteſy.

§ 13. Where

§ 13. Where the anceſtor dies ſeiſed, and the heir dies before he has made an actual entry on the lands, his widow ſhall notwithſtanding be endowed; becauſe, by the deſcent of the lands on the heir, he acquired a ſeiſin and freehold in law, though not in deed. It would be the ſame, if, upon the death of the anceſtor, a ſtranger had entered upon the lands and abated; for, between the death of the anceſtor and the entry of the abator, there was a ſpace of time during which the heir had a ſeiſin in law. Lit. ſ. 448. Tit. 1. ſ. 36. Perk. 371.

§ 14. If the anceſtor died ſeiſed, and a ſtranger had abated, and afterwards the ſon had married, and died before entry, his widow would not be entitled to dower; becauſe the ſeiſin in law which the ſon had acquired upon the death of his anceſtor, was deveſted by the abatement, before the marriage. So that the ſon had neither a ſeiſin in law, nor in deed, during the coverture. Perk. 367.

§ 15. Lord *Coke* ſays, that if a huſband makes a leaſe for life, reſerving rent to him and his heirs, and marries and dies, his wife ſhall not be endowed of the reverſion, becauſe there was no ſeiſin in deed or in law of the freehold; nor of the rent, becauſe the huſband had but a particular eſtate therein, and no fee-ſimple. But if the huſband makes a leaſe for years reſerving a rent, and marries, and dies, the wife ſhall be endowed of the third part of the reverſion, together with the third part of the rent. 1 Inſt. 32 *a*.

§ 16. If

1 Inſt. 42 *a.* 2 Vern. 404. Tit. 3. ſ. 8.

§ 16. If a perſon deviſes his lands to his executor for the payment of his debts, and, after the payment of his debts, to his ſon in tail, and the ſon marries, and dies before the debts are paid, yet his wife ſhall have dower; becauſe the eſtate of the executors is only a chattel intereſt, and the freehold veſted in the ſon on the death of his father. But, in a caſe of this kind, the wife's dower cannot commence in poſſeſſion, nor can damages be recovered for detaining it, until the debts of the teſtator are paid.

2 Comm. 132.

§ 17. Sir *William Blackſtone* ſays, that if the land abides in the huſband for the interval of but a ſingle moment, it ſeems that the wife ſhall be endowed thereof. Thus it has been ſtated, that although a ſtranger ſhould enter immediately on the death of the anceſtor, yet the ſeiſin in law which the heir acquired upon the death of his anceſtor, and which only laſted for an inſtant, was ſufficient to entitle his wife to dower.

Broughton v. Randall, Cro. Eliz. 502. Noy, 64.

§ 18. So, where the father and ſon were both hanged in one cart, but the ſon was ſuppoſed to have ſurvived the father, by appearing to ſtruggle longeſt; whereby he became ſeiſed in fee of an eſtate by ſurvivorſhip; in conſequence of this ſeiſin, his wife had a verdict for her dower.

Taylor's caſe, 1 Jon. 317.

§ 19. If a tenant for years, or at will, makes a feoffment in fee, his wife ſhall be endowed, until the feoffment is defeated; becauſe the tenant for years acquired the freehold and ownerſhip of the land by diſſeiſin.

§ 20. It

§ 20. It is, however, laid down by Lord *Coke*, that of a ſeiſin for an inſtant, a woman ſhall not be endowed. This poſition is thus explained by *Blackſtone*: " The ſeiſin of the huſband for a tranſitory inſtant " only, when the ſame act which gives him the eſtate, " conveys it alſo out of him again, (as where by a " fine land is granted to a man, and he immediately " renders it back by the ſame fine), ſuch a ſeiſin will " not entitle the wife to dower: for the land was " merely in *tranſitu*, and never reſted in the huſband; " the grant and render being one continued act." 1 Inſt. 31 *b*. 2 Comm. 131.

§ 21. Thus Lord *Coke* ſays, that if two joint tenants be in fee, and one of them makes a feoffment in fee, his wife ſhall not be endowed. 1 Inſt. 31 *b*.

§ 22. If leſſee for life makes a feoffment in fee, and dies, his wife ſhall not have dower; becauſe he gained the fee but for an inſtant, and parted with it again, and this was no diſſeiſin. Bro. Ab. Tit. Dower, p. 30.

§ 23. Where a tenant in ſpecial tail married a ſecond wife, who was not dowable of the eſtate tail, (infra. ch. 3.), and afterwards made a feoffment in fee, and died; it was reſolved that his widow ſhould not have dower, becauſe her huſband gained the fee but for an inſtant. Amcotts v. Catherick, Cro. Ja. 615.

§ 24. Where a huſband became entitled to eſtates by virtue of ſurrenders from tenants by copy of court roll, and immediately granted them out again by copy of court roll. It was decreed by Sir *Joſeph Jekyll*, that this Sneyd v. Sneyd, 1 Atk. 442. 4 Rep. 24 *a*. Vide Tit. 10.

this inſtantaneous ſeiſin of the freehold would not entitle the wife to dower.

§ 25. With reſpect to the ſeiſin which is neceſſary by the cuſtom of *Gavelkind*, to entitle a woman to dower, Mr. *Lambard*, in his perambulation of *Kent*, has advanced an opinion, that a ſeiſin in law is not ſufficient to entitle a woman to dower; becauſe the words of the cuſtom are, "*De tenements dont ſon baron* "*mouruſt veſtu et ſeiſi*;" which only extends to lands whereof the huſband was really and actually ſeiſed; and cuſtoms derogatory to the common law, ought to receive a ſtrict conſtruction.

P. 117. Mr. *Robinſon*, in his treatiſe on *Gavelkind*, has controverted this opinion, and obſerved, that whatever may be the ſtrict literal ſenſe of the word *veſtu*, it can ſcarce be ſufficient to add ſo unreaſonable a qualification to the cuſtom, as that the neglect of the huſband in gaining an actual ſeiſin by entry, ſhall prejudice the wife, without a ſtrong uſage accordingly.

§ 26. It follows, from theſe caſes, that although the huſband ſhould have a clear right to the lands, under a conveyance to uſes, yet, if he does not enter, 6 Rep. 34 *a*. his wife will not be entitled to dower. Thus, where a man bargained and ſold land to another and his heirs, with a proviſo, that if a particular act was done, the bargain and ſale ſhould be void; afterwards the bargainor married, and the proviſo was broken: the huſband died before entry. Adjudged that his widow ſhould not be endowed.

§ 27. The

§ 27. The laſt circumſtance required to the exiſtence of an eſtate in dower, is the death of the huſband: and it is ſaid, that nothing but the natural death of the huſband will give a title to dower. Though there are ſome authorities to prove, that baniſhment by abjuration, or by parliament, which is a civil death, will have the ſame effect.

Death of the Huſband.

1 Inſt. 53 *b.*

Jenk. Cent. 1. Caſe 4.
1 Inſt. 133 *a.*

§ 28. With reſpect to the perſons who are capable of being endowed, all women, who are natural born ſubjects, and have attained the age of nine years, are, by the common law, entitled to dower, although their huſbands ſhould be but four years old. And Lord *Coke* ſays, that if a man marries a woman who is only ſeven years old, and afterwards aliens his land, and the wife attains the age of nine years, and then the huſband dies, ſhe ſhall be endowed. For although ſhe was not abſolutely dowable at the time of her marriage, yet ſhe was conditionally dowable, if ſhe attained the age of nine years before the death of her huſband.

Who may be endowed.

Lit. f. 36.

1 Inſt. 33 *a.*

§ 29. Notwithſtanding the favour which common law ſhews to women in this reſpect, yet there are ſome caſes in which women are incapable of claiming dower.

Who are incapable of having Dower.

§ 30. Aliens are not capable of claiming dower; for the ſame reaſon, that an alien cannot be tenant by the curteſy. But by the *lex coronæ*, the queen might be endowed; and in conſequence of a petition from the commons, an act of parliament was made in 8 *Hen.* 5., (not printed in the ſtatutes), by which all

Aliens.

Vide Tit. 5. ch. 1. ſ. 27.

Rot. Parl. vol. 4. p. 128.

women aliens, who from thenceforth ſhould be married to *Engliſhmen*, by licence from the king, are enabled to demand their dower after their huſband's death, in the ſame manner as *Engliſh* women.

§ 31. But if an alien be naturalized by act of parliament, ſhe then becomes entitled to dower, out of all the lands whereof her huſband was ſeiſed during the coverture.

13 Rep. 23.

§ 32. In the caſe where a woman is created a denizen, ſhe becomes entitled to dower out of all the lands whereof her huſband was ſeiſed at the time when ſhe was created a denizen: but not out of lands whereof he was ſeiſed before, and which he had aliened.

Jeweſſes.
1 Inſt. 31 *b.* n. 1.

§ 33. Lord *Coke* ſays, that if a *Jew* born in *England*, marries a *Jeweſs*, born alſo in *England*, and the huſband becomes a convert, and purchaſes lands, his wife ſhall not be endowed.

Women ſtolen.

§ 34. By the ſtatute 6 *Rich.* 2. ſtat. 1. c. 6., it is enacted, that whenever any woman is raviſhed, (that is ſtolen), and afterwards conſents to live with ſuch raviſher, ſhe ſhall be *ipſo facto* diſabled from claiming dower.

TITLE

TITLE VI.

DOWER.

CHAP. III.

Of what Things a Woman is dowable, and the Nature of this Eſtate.

§ 1. *Eſtates in Fee-Simple.*
4. *Eſtates Tail.*
8. *Qualified or Baſe Fees.*
9. *Reverſions after Eſtates for Years.*
11. *Equities of Redemption of ſome Kinds.*
12. *Lands ſequeſtered.*
13. *Eſtates in Coparcenary and in Common.*
14. *Copyholds.*
15. *Incorporeal Hereditaments.*
16. *Where a Widow ſhall have an Election.*
18. *What Things are not liable to Dower.*
§ 19. *Eſtates not of Inheritance.*
21. *Eſtates in Joint-Tenancy.*
22. *Wrongful Eſtates.*
24. *Lands aſſigned for Dower.*
29. *A Caſtle or Fortreſs.*
31. *Mortgages.*
32. *Uſes and Truſts.*
33. *Where Dower ceaſes with the Eſtate.*
34. *Nature of this Eſtate.*
36. *The Dowreſs entitled to Emblements.*
37. *Reſtrained from Alienation.*
39. *And from Waſte.*
40. *Not ſubject to her Huſband's Incumbrances.*

Section 1.

Eſtates in Fee-Simple.

A WOMAN is entitled to dower out of all the lands, tenements, and hereditaments whereof her huſband was ſeiſed, in fee-ſimple, at any time during the coverture.

Buckeridge v. Ingram, 1 Ves. jun. 652.

§ 2. A woman is entitled to dower out of ſhares in the navigation of the river *Avon*, where the huſband is tenant in fee of ſuch ſhares.

1 Inſt. 31 *b.*

§ 3. If the huſband ſeiſed in fee of lands, exchanges them for other lands, his widow ſhall have her election to be endowed, either of the lands given, or taken in exchange; becauſe her huſband was ſeiſed of both during the coverture. But ſhe ſhall not have dower of both, for that would be unreaſonable.

Eſtates Tail.

§. 4. A woman is alſo entitled to dower out of eſtates in tail general or ſpecial; and dower is an incident ſo inſeparably annexed to an eſtate tail, that it cannot be reſtrained by any proviſo or condition whatever.

1 Inſt. 224 *a.*

1 Inſt. 31 *b.*

§ 5. Although the eſtate tail ſhould determine by the death of the huſband, without iſſue capable of inheriting the eſtate tail, yet the wife ſhall be endowed of a third of ſuch eſtate; becauſe dower, like curteſy, is a condition *tacite* annexed to the gift of every eſtate tail.

Vide Tit. 5. ch. 2.

Blithman's caſe, 2 Rep. 52 *a.* Cro. Eliz. 280. Noy, 46. Tit. 2. ch. 2. ſ. 19. Doe v. Rivers, Tit. 5. ch. 2.

§ 6. If a tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of his eldeſt ſon in tail, and afterwards marries and dies, his wife ſhall be endowed; becauſe, when a tenant in tail limits an eſtate for his own life, he has executed all the power that he had, and the remainder is merely void; ſo that he continues tenant in tail, as he was before.

Lit. ſ. 53.

§ 7. It ſhould, however, be obſerved, that a woman is not dowable of an eſtate tail, unleſs her iſſue is capable of inheriting it. So that if lands are limited

to

to *A.* and the heirs of his body by *B.* his wife, and *B.* dies, if *A.* marries a ſecond wife ſhe will not be entitled to dower; becauſe her iſſue cannot inherit this eſtate tail.

Qualified or Baſe Fees.

Seymour's caſe, 10 Rep. 95.

§ 8. A woman is dowable of a qualified or baſe fee until it is defeated. So that if a tenant in tail conveys his eſtate tail, by fine, to *A.* and his heirs, the wife of *A.* is entitled to dower againſt her huſband's heirs. It is the ſame where an eſtate tail is conveyed to a perſon and his heirs by bargain and ſale, or leaſe and releaſe.

Plowd. 557.

§ 9. Where a tenant in tail is attainted of high treaſon, the king becomes entitled to the eſtate as long as there are heirs of the body of the tenant in tail; and if the king grants this eſtate to a man and his heirs, the wife of ſuch grantee will be dowable of it; for he has a qualified fee.

Reverſions after Eſtates for Years.

1 Inſt. 32 *a.*

§ 10. A woman is entitled to dower of a reverſion expectant on a term for years. Thus, if a man, either before or after marriage, makes a leaſe for years, reſerving rent, his wife will be entitled to a third of the land for her dower; and alſo to a third of the rent, as incident to the reverſion. But if no rent be reſerved on a leaſe for years, made before the marriage, then, although the widow may recover a third of the reverſion, yet it will be with a *ceſſat executio* during the term.

Equities of Redemption of ſome Kinds.

§ 11. Where lands are mortgaged for a term of years only, a woman will be entitled to dower of the

equity of redemption. But if the lands are mortgaged in fee, the wife will not be entitled to dower. The reaſons for this difference will be explained under Title XV. Mortgage.

Lands ſequeſtered.

Anon. 1 Vern. 118.

§ 12. If lands are ſequeſtered by the Court of Chancery, before marriage, for a perſonal duty, yet a right to dower will attach on them.

Eſtates in Coparcenary and in Common.

§ 13. A woman is dowable of an eſtate held in coparcenary, or in common; but not of an eſtate held in joint tenancy. The reaſon of which will be ſtated under thoſe Titles.

Copyholds.

§ 14. We have ſeen that there may be a cuſtomary dower of copyhold eſtates.—An account of this ſpecies of dower, and of the incidents attending it, will be given under Title X. Copyhold.

Incorporeal Hereditaments.

§ 15. Incorporeal hereditaments, ſuch as advowſons, tythes, commons, and rents, are alſo liable to dower; as will be ſhewn under thoſe reſpective Titles.

Where a Widow ſhall have an Election.

Ante, ſ. 3.

§ 16. There are ſome caſes in which a widow has a right of election, as to the property out of which ſhe is entitled to dower. Thus, it has been ſtated, that a woman ſhall not be endowed both of the land given in exchange and of the land taken in exchange, but ſhe may have her election to be endowed of which ſhe will.

§ 17. So

§ 17. So if a perſon, having a ſeignory, marries, and afterwards purchaſes the tenancy in fee, and dies, his widow ſhall have an election to be endowed either of the ſeignory or of the tenancy. But if the tenancy had eſcheated, the wife would not have an election, but would be obliged to accept dower out of the tenancy; becauſe the ſeignory was determined during the coverture by the act of law. Perk. ſ. 320.

There are ſome other caſes where a widow has a right of election, which will be mentioned in the ſubſequent Titles.

§ 18. Having ſtated the different kinds of property which are liable to dower, I ſhall now examine what things are exempted from this charge. What Things are not liable to Dower.

§ 19. An eſtate in dower is a continuation of the inheritance, and is therefore only incident to eſtates of inheritance, and not to mere eſtates for life. Thus, *Bracton* ſays, "*Si autem ita facta eſſet donatio, ut ſi* "*dicam do tibi tantam terram, nulla facta mentione de* "*hæredibus, iſta donatio ſe non extendit ad hæredes,* "*niſi tantum ad vitam donatoris; ideo ceſſat detis* "*petitio.*" Eſtates not of Inheritance. 92 *b.* 3 P. Wms. 263.

§ 20. It is not only neceſſary that the huſband ſhould have an eſtate of inheritance, to entitle his wife to dower, but that inheritance muſt be *ſimul et ſemel* in him. The caſes on this ſubject will be ſtated in Title XVI. Remainder.

Eſtates in Joint-Tenancy.

§ 21. Eſtates held in joint tenancy are not ſubject to dower; the reaſon of which will be ſtated under that Title.

Wrongful Eſtates.
1 Inſt. 31 *b.* Fitz. N. B. 149.

§ 22. A woman is not dowable of a wrongful eſtate. So that if a tenant in tail diſcontinues in fee, and afterwards marries, and diſſeiſes the diſcontinuee, and dies ſeiſed, his wife ſhall not have dower; becauſe the iſſue is remitted to the ancient intail, and the eſtate of the huſband was wrongful,

Id.
Vide Tit. 5. ch. 1. ſ. 12.

§ 23. So, where a man, having a title to land, enters, and diſſeiſes the tenant, and dies ſeiſed, upon which his heir enters: now the heir is remitted to the ancient right which his anceſtor had; and, by conſequence, the wife of the anceſtor is not entitled to dower out of the wrongful eſtate, whereof her huſband was ſeiſed, during the coverture,

Lands aſſigned for Dower.
1 Inſt. 31 *a.* Buſtard's caſe, 4 Rep. 121.

§ 24. A woman is not dowable of lands aſſigned to another woman in dower: ſo that if the anceſtor of a married man dies, and he endows the widow of ſuch anceſtor of one third of the lands which deſcended to him, and dies, his widow will only be entitled to a third of the remaining two thirds; for it is a maxim of law, that *dos de dote peti non debet.* And this rule is as ancient as the time of *Glanville*, who ſays, Lib. 6. c. 17. "*Item in diviſionem non veniunt res quas te-*
"*nerunt mulieres aliæ in dotem, unde prius dotatæ*
"*fuerint.*"

§ 25. The

§ 25. The reaſon upon which this doctrine is founded is, that when the heir endows the widow of the anceſtor, the aſſignment of ſuch dower defeats the ſeiſin which the heir acquired by the deſcent of the lands on him: ſo that the widow is in of the eſtate of her huſband, and the heir is conſidered as never having been ſeiſed. Vide infra, ch. 4.

§ 26. In the ſame manner, if a woman, on whom lands deſcend, endows her mother, and afterwards marries and has iſſue, and dies in the life-time of her mother, her huſband will not be entitled to an eſtate by the curteſy in thoſe lands whereof the mother was endowed; becauſe the daughter's ſeiſin was defeated by this endowment. Bro. Ab. Tit. Ten. per le Curteſy, 10.

§ 27. Where no dower is aſſigned, the rule of *dos de dote* does not take place.

§ 28. Lands, ſubject to a title of dower, were deviſed to a perſon in fee, who died leaving a widow; this widow ſued for her dower and recovered a third part of the whole, without any regard to the title of dower in the widow of the teſtator, who did not put her claim in ſuit. It was holden by the court, that the teſtator's widow, not having recovered her dower, it was to be laid out of the caſe; and the dower of the deviſee's widow was not therefore to be looked upon as *dos de dote*. Hilchins v. Hilchins, 2 Vern. 403.

§ 29. By the old law, confirmed by *Magna Charta*, c. 7. a woman was not dowable of a caſtle or fortreſs, nor A Caſtle or Fortreſs. Bract. 93 *a*.

2 Inſt. 16. 1 Inſt. 31 *b.*

nor even of the capital meſſuage, being *caput baroniæ* or *comitatus*. This doctrine muſt, however, be underſtood to be applicable to baronies by tenure only; and, therefore, the circumſtance of a perſon's being created a baron by a title taken from a principal manſion-houſe in his poſſeſſion, will not make that houſe *caput baroniæ*, ſo as to exclude the wife from claiming dower out of it; for ſuch a barony is merely titular, and a titular barony cannot have *caput baroniæ*.

Gerrard v. Gerrard, 5 Mod. 64.

§ 30. Lady *Gerrard* brought a writ of dower, and demanded a third part of a capital meſſuage called *Bromley Hall*.

The defendant pleaded that, time out of memory, it had been called as well by the name of *Gerard's Bromley* as *Bromley Hall*, of which Sir *Thomas Gerard* Knt. was created Lord *Gerard* of *Gerard's Bromley*, he being reſident with his family in the ſaid capital meſſuage, and the ſaid meſſuage then became *caput baroniæ ſuæ*, and derived the title of the meſſuage and barony to himſelf, by divers deſcents; and demanded judgement, if ſhe ſhould be endowed of it, and averred that he had aſſigned to her a third part of his other lands, *&c.* The demandant demurred generally. The Court of Common Pleas gave judgement for the demandant.

Upon a writ of error in the Court of King's Bench, the judgement was affirmed.

§ 31. A woman

§ 31. A woman is not entitled to dower out of an eſtate conveyed to her huſband by way of mortgage; of which, an account will be given in Title Mortgage. Mortgages.

§ 32. A woman was never allowed dower of a uſe, nor is ſhe now entitled to dower out of a truſt eſtate; of which, the reaſons will be given in Titles Uſe and Truſt. Uſes and Truſts.

§ 33. We have ſeen, that in caſes of eſtates tail, the dower of the wife, and the curteſy of the huſband, continue after the eſtate charged with them is determined. But there are ſeveral caſes in which dower and curteſy ceaſe upon the determination of the eſtate; 1ſt, Where the fee is evicted by a title paramount, both dower and curteſy neceſſarily ceaſe: 2d, Where the ſeiſin of the huſband is wrongful, and the heir is remitted, by which the wrongful eſtate is determined, the right to dower ceaſes: 3d, Where the donor enters for breach of a condition, it defeats the right to dower and curteſy: 4th, Where a perſon ſeiſed in tail, or of any other determinable fee, conveys in fee, the right to dower and curteſy can only be commenſurate with the eſtate of the grantee, and muſt neceſſarily ceaſe when that eſtate is determined: 5th, Where an eſtate in fee is only to continue until a certain event happens, it ſeems doubtful whether the wife ſhall be endowed or not. But where an eſtate in fee is originally created, but by ſubſequent words is made determinable upon ſome particular event; there, if that particular event happens, the wife's dower and the Where Dower ceaſes with the Eſtate. Ante, f. 5. Tit. 5. ch. 2. Lit. f. 393. Ante, f. 22, 23. Tit. 5. ch. 1. f. 12. Vide Tit. 13. 10 Rep. 97 *b*. 98 *a*. Flavell v. Ventrice, 1 Roll. Ab. 676. 1 Leon. 168. Vide 1 Inſt. 241 *a*. n. 4.

husband's curtesy cease with the estate. The case of *Buckworth* v. *Thirkell*, contradicts this doctrine.

Vide Tit. 38.

Nature of this Estate.

§. 34. The interest which the wife acquired in the lands by way of dower, was seldom greater than for her own life, unless it was otherwise stipulated at the time of the marriage: and, in *England*, dower does not appear to have ever consisted of more than an estate for life.

1 Inst. 148 *b.* 241 *a.*

Gilb. Uses, 357.

§ 35. Before the abolition of military services, the dowress was attendant on the heir, or whoever else was entitled to the reversion, for the third part of the services which her husband was bound to perform; and still she holds of the heir by fealty: for the assignment of dower by the heir is a species of infeudation which is not prohibited by the statute of *quia emptores*, because the heir does not depart with the fee.

The Dowress entitled to Emblements.

2 Inst. 80.

Id. 81.

1 Inst. 55 *b.* n. 3.

§ 36. By the common law, a tenant in dower could not devise corn which she had sown, nor did it go to her executors, but became the property of the person in reversion; because the wife being entitled to an immediate assignment of dower, after the death of her husband, if the lands happened to be sown at that time, she took the benefit of it; which made her case different from that of other tenants for life, who are never put into possession of lands which are sown. But it was provided by the statute of *Merton*, 20 *Hen.* 3. c. 2., that a dowress may dispose by will of the growing corn, otherwise it goes to her executors.

§ 37. Tenants

§ 37. Tenants in dower were under the ſame reſtraints reſpecting alienation, as other tenants for life: but where tenant in dower aliened by feoffment, and the feoffee died ſeiſed, whereby the entry of the perſon in reverſion was taken away, he could have no writ of entry *ad communem legem*, till after the deceaſe of the tenant in dower. But by the ſtatute of *Glouceſter*, 6 *Edw.* 1. c. 7., it is provided, that upon the alienation in fee, or for life of a tenant in dower, ſhe ſhall forfeit her eſtate, and the heir ſhall have a writ of entry *in caſu proviſo*.

Reſtrained from Alienation.

2 Inſt. 309.

§ 38. By the ſtatutes 11 *Hen.* 7. c. 20. and 32 *Hen.* 8. c. 36. ſ. 2. it is provided, that no feoffment, fine, recovery, or waranty, by tenant in dower, ſhall operate as a diſcontinuance of her eſtate, or take away the entry of the heir, or perſon in reverſion; but that all ſuch acts ſhall operate as a forfeiture of her eſtate.

Vide Tit. 36.

§ 39. Tenants in dower, having only an eſtate for life, are not by law entitled to commit any kind of waſte: but it is ſomewhat doubtful, whether they are within the ſtatute 6 *Ann*, c. 31., reſpecting accidental fire.

And from Waſte.

1 Inſt. 57 *a*. n. 1.

§ 40. The widow holds her dower diſcharged from all judgments, leaſes, mortgages, or other incumbrances, made or created by her huſband after the marriage; becauſe, upon the huſband's death, the title of the wife being conſummate, has relation back to the time of the marriage, and to the ſeiſin which her huſband

Not ſubject to her Huſband's Incumbrances.

1 Inſt. 46 *a*. 4 Rep. 65 *a*.

band then had: both of which precede ſuch incumbrances.

1 Inſt. 31 *a.* Fitz. N. B. 150.

§ 41. Dower is even protected from diſtreſs for a debt due to the crown, contracted during the marriage; and if the lands are diſtrained upon, the dowreſs may have a writ to the ſheriff, commanding him not to diſtrain, or to reſtore the diſtreſs, if any be taken.

TITLE

TITLE VI.

DOWER.

CHAP. IV.

Of the Aſſignment of Dower, and the Modes of recovering it.

§ 1. *Neceſſity of an Aſſignment of Dower.*
5. *Who may aſſign Dower.*
10. *How Dower is to be aſſigned.*
23. *Remedies againſt an improper Aſſignment.*
28. *Effect of an Aſſignment of Dower.*
§ 31. *Of Actions for recovering Dower.*
36. *Of Damages in Actions for Dower.*
42. *A Widow may now obtain her Dower in Chancery.*

Section 1.

Neceſſity of an Aſſignment of Dower. Lit. ſ. 43.

UPON the death of the huſband, the right to dower which the wife acquired by her marriage, becomes conſummate. But unleſs the preciſe portion of land which ſhe is to have, is particularly ſpecified, as uſed to be the caſe in dower *ad oſtium eccleſiæ*, and *ex aſſenſu patris*, ſhe cannot enter until her dower is aſſigned to her; for ſhe might chooſe whatever part of the lands ſhe pleaſed, which would be an injury to the heir.

Gilb. Ten. 26.

§ 2. The widow has, therefore, no eſtate in the land until aſſignment, for the law caſts the freehold on the heir, immediately upon the death of the anceſtor.

§ 3. A widow

1 Inſt. 34 *b.*
2 Inſt. 16.
2 Comm. 135.

§ 3. A widow could not formerly obtain an aſſignment of her dower, without paying a fine to the lord; nor could ſhe marry a ſecond huſband, without his licence. It was even uſual for lords to force widows to marry, merely for the purpoſe of obtaining a fine. But it was provided by the charter of *Hen* 1., and alſo by *Magna Charta*, c. 7., that widows ſhould not be forced to marry, nor be obliged to pay a fine for the aſſignment of their dower.

1 Inſt. 34 *b.*
2 —— 16.

§ 4. Widows were alſo allowed, by *Magna Charta*, to remain in the manſion-houſes of their huſbands for forty days after their death, which was called their *quarantine*. This cuſtom was probably introduced, that widows might not be under the neceſſity of appearing in public, and ſeeking out a habitation, immediately after the death of their huſbands. It might alſo be intended to prevent a ſuppoſitious child, a ſpecies of deceit which appears not to have been uncommon in thoſe times, as may be inferred from the writ *de ventre inſpiciendo*.

Barrington on Mag. Charta, ch. 7.

Who may aſſign Dower. Gilb. Uſes, 356.

§ 5. With reſpect to the perſons whoſe duty it was to aſſign dower, the heir in common caſes, as lord of the manor, and who was to create the tenure, aſſigned dower; and if there was any diſpute as to the quantity of land aſſigned, it was determined by the *pares curiæ*. But the ſuit might be removed to the county court, and alſo to the king's court.

Fitz. N. B. 263.
2 Inſt. 270.

§ 6. Where lands were held of the King in *capite*, and the heir was in ward, the widow was obliged to

ſue in chancery for her dower, and after office found, that ſhe was the late tenant's widow, ſhe was to make oath in chancery, that ſhe would not marry again without the king's licence; and, upon that, a writ iſſued to the *eſcheator de dote aſſignanda.*

§ 7. No perſon can aſſign dower who has not a freehold eſtate in the land. But in caſe a diſſeiſor, abator, or intruder aſſigns dower, it is good, and cannot be avoided; unleſs they are in of ſuch eſtates by fraud and covin of the widow, to the intent that ſhe may be endowed by them, or recover dower againſt them: and, in that caſe, the aſſignment may be avoided by the entry of the real owner. Inſt. 35 *a.* 357 *b.*

§ 8. The reaſon why ſuch an aſſignment of dower ſhall be good is, becauſe the widow having a right to dower, ſhe might have compelled them as terre tenants to aſſign dower to her, and was not obliged to wait until the heir thought proper to re-enter, or ſue for the recovery of his right.

§ 9. Where the heir or other tenant of the land refuſes to aſſign dower, and the widow is compelled to reſort to the courts of law to obtain her dower, the aſſignment is made by the ſheriff. 1 Inſt. 34 *b.*

§ 10. With reſpect to the manner in which dower ought to be aſſigned, the rule is, that where the property aſſigned is capable of being ſevered, it muſt be by metes and bounds. And if the ſheriff does not return ſeiſin by metes and bounds, it is ill; but where 1 Inſt. 32 *b.*

How Dower is to be aſſigned.

1 Inſt. 32 *a.* no diviſion can be made of an inheritance, a woman ſhall be endowed thereof in a ſpecial and certain manner. As of a mill, a woman ſhall not be endowed by metes and bounds, nor in common with the heir, but either ſhe may be endowed of the third tolle diſhe, or of the entire mill for a certain time.

Gilb. Uſes, 356. § 11. Dower was aſſigned by metes and bounds, becauſe it was a tenancy of the heir, and, like all other lands in tenure, ought to be ſeparated from the demeſnes of the manor; and the reaſon why the law created this tenure was, that the heir might be obliged to do the ſervice for it, during the time of its continuance, as he was obliged to do for all lands which he had given out in tenure, as well as for thoſe which he held in demeſne.

§ 12. The right to have an aſſignment of dower by metes and bounds, may be waived by the widow; and, in that caſe, an aſſignment in common will be good.

Coots v. Lambert, 9 Vin. Ab. 256. § 13. If *A.* ſeiſed of lands in fee takes a wife, and after deviſes it for 21 years to *B.*, and dies, and after *C.* his heir aſſigns to the wife the third part of the land for her dower, without ſetting it out by metes and bounds, and the wife accepts it in ſatisfaction of her dower, though ſhe was not bound to accept ſo in common, without ſetting it out by metes and bounds, nor the heir bound to aſſign it, but by metes and bounds, for the prejudice that may accrue to them to occupy it in common, yet, inaſmuch as the third part in

in common is due by law, and they both conſent to accept it according to law, they may, by their conſent, waive the aſſignment by metes and bounds, which is only for their own advantage, and accept it as it is due by law; and though the leſſee for years did not agree thereto, yet the aſſignment of the tenant of the freehold ſhall bind him.

§ 14. An aſſignment by metes and bounds can only take place where the huſband is ſeiſed in ſeveralty: for where he is ſeiſed in common, his widow cannot be endowed by metes and bounds; for ſhe being in *pro tanto* of her huſband's eſtate, cannot have it in another manner than her huſband. 1 Inſt. 32 *b.* Lit. ſ. 44.

§ 15. In dower againſt the heir of her huſband, the tenant pleaded, that *A.* was ſeiſed, and deviſed the tenements to the huſband and two more equally to be divided, and ſo demands judgment of the writ, ſuppoſing that ſhe could not ſue dower before partition againſt tenants in common; but, upon demurrer, adjudged that the writ well lies. Sutton v. Rolfe, 3 Lev. 84.

§ 16. Where dower is aſſigned by the ſheriff, he is bound to aſſign a third part of each manor, or a third part of the arable, a third of the meadow, and a third of the paſture. But where dower is aſſigned by the heir, he may aſſign one manor, in lieu of a third of each three manors, &c. which is good, if accepted by the widow; and this is called an aſſignment againſt common right. 1 Roll. Ab. 683, 4.

1 Inſt. 32 *b.* § 17. Lord *Coke* ſays, that an endowment by metes and bounds, according to common right, is more beneficial to the widow, than to be endowed againſt common right; for there ſhe ſhall hold the land charged in reſpect of a charge made, after her title to dower.

4 Rep. 1 *b.* § 18. The aſſignment of dower muſt be of part of the lands whereof the widow is dowable; for an aſſignment of lands whereof a widow is not dowable, or of a rent iſſuing out of ſuch lands, is no bar of dower; becauſe a right or title to a freehold eſtate cannot be barred by a collateral ſecurity.

1 Roll. Ab. 683. Brickley v. Brickley, And. 287. § 19. A rent iſſuing out of the land whereof a woman is dowable, may be aſſigned in lieu of dower. And if a tenant in tail aſſigns a rent out of the land intailed, to a woman entitled to dower, out of ſuch eſtate tail, not exceeding the yearly value of her dower, it will bind the iſſue in tail.

4 Rep. 122 *a.* § 20. In ſome caſes, a widow ſhall have a new aſſignment of dower; as where lands aſſigned to a widow for her dower are evicted, ſhe ſhall be endowed of a third of the remaining lands.

1 Inſt. 34 *b.* § 21. The aſſignment of dower muſt be abſolute, and not ſubject to be defeated by any condition, nor leſſened by any exception or reſervation: for the widow comes to her dower in the *per*, by her huſband, and is *in*, in continuation of his eſtate, which the heir or terretenant is but a miniſter or officer of the law to carve

carve out to her; and therefore ſuch conditions or reſervations are totally void, and her eſtate diſcharged from them; or elſe the eſtate aſſigned with ſuch conditions is no bar to her recovery of dower in an action.

§ 22. In dower, the tenant pleaded, that he, by indenture, granted a rent out of the ſaid land to the demandant, in recompence of her dower, which ſhe accepted. The demandant confeſſed the grant of the rent, and her acceptance; but ſaid, that in the ſame indenture there was a condition, that if the rent was not paid within ſuch a time, after it became due, it ſhould ceaſe, and the indenture be void; and ſhewed a breach. It was adjudged upon demurrer for the demandant: becauſe it was pleaded as a grant, and alſo, becauſe it was upon condition; for rent aſſigned in recompence of dower, and as that which comes in lieu of the land, ought to be abſolute, as the aſſignment of the land itſelf: therefore the condition annexed was void, or if it were good, yet being only annexed to it as a grant, upon breach thereof, the widow was reſtored to her dower. Wentworth's caſe, Cro. Eliz. 450.

§ 23. Where the ſheriff makes an improper or malicious aſſignment of dower, it will be ſet aſide, and the ſheriff will be puniſhed. Remedies againſt an improper Aſſignment.

§ 24. Thus, where the ſheriff returned that he had aſſigned to the demandant for her dower of a houſe, the third part of each chamber, and had chalked it out Palm. 264, 5.

for her. This was held an idle and malicious aſſignment, and the ſheriff was committed for it; as he ought to have aſſigned to her certain chambers or rooms therein.

Longvill's caſe, 1 Keb. 743.

§ 25. In another caſe, the ſheriff was committed for refuſing to make an equal allotment of dower; and for taking ſixty pounds to execute his writ of execution; and an information ordered againſt him.

§ 26. The Court of Chancery will alſo relieve againſt a partial or fraudulent aſſignment of dower.

Hoby v. Hoby, 1 Vern. 218. 1 Cha. Rep. 160.

§ 27. A bill was brought to be relieved againſt a fraudulent aſſignment of dower by the ſheriff; becauſe only a third part of the lands was aſſigned, without taking notice of a coal-work, which was on the eſtate. The court ordered that the dowreſs ſhould, if ſhe pleaſed, have a new aſſignment.

Effect of an Aſſignment of Dower.

§ 28. The widow acquires an eſtate of freehold by the aſſignment without livery of ſeiſin, becauſe her title to dower ariſes from the principles of the law; and the aſſignment is an act of equal notority with the livery of ſeiſin.

Gilb. Uſes, 356. 395.

§ 29. As ſoon as dower is aſſigned, the widow holds by the inſtitution of the law, and is *in* of the eſtate of her huſband; ſo that, after aſſignment, ſhe is conſidered as holding by an infeudation immediately from the death of her huſband; and therefore, the heir is not

not conſidered as having ever been ſeiſed of that part of his anceſtor's eſtate, whereof the widow is endowed. Vide Chap. 3.

§ 30. When dower is aſſigned, there is a warranty in law included, that the tenant in dower being impleaded, ſhall vouch and recover in value a third of the two remaining parts whereof ſhe is dowable. 1 Inſt. 38 *b.*

§ 31. Where the wife was refuſed her dower by the heir, or terretenant, the law provided her with ſeveral remedies for the recovery of it. Of Actions for recovering Dower. Fitz. N. B. 147.

The firſt of theſe is the writ of dower *unde nihil habet*, which lies where no dower has been aſſigned. But if any part of the dower has been aſſigned, the widow cannot ſay, *unde nihil habet*; and therefore ſhe muſt have recourſe to the writ of right of dower, which is a more general remedy, extending either to a part, or to the whole; and is, with reſpect to the claim of dower, of the ſame nature and efficacy as the grand writ of right, reſpecting a claim to an eſtate in fee ſimple. Gilb. Uſes, 374. Id. 367.

§ 32. In actions of this kind, the parol does not demur, on account of the infancy of the heir; for it is neceſſary that the widow's claim ſhould be immediately determined, otherwiſe ſhe might want a preſent ſubſiſtence; nor can the judgment in theſe actions be ſet aſide on account of the infancy of one of the defendants. 1 Roll. Ab. 137. Gore v. Perdue, Cro. Eliz. 309.

Fitz. N. B. 148. Gilb. Uſes, 379. 381.

§ 33. Where the heir within age endows the widow of more than ſhe is entitled to, or where the guardian endows the widow of more than a third part, the heir, when he attains his full age, may have a writ of admeaſurement of dower againſt the widow, whereby her dower ſhall be admeaſured; and the ſurplus which ſhe had in dower ſhall be reſtored to the heir.

Id.

§ 34. The writ of admeaſurement of dower is viſcontiel, and returnable before the ſheriff, and therefore the parties may plead before him if they think proper. But the plaintiff may, without ſhewing any cauſe, and the defendant upon ſhewing cauſe, remove the writ into the court of common pleas, and, thereupon, proceſs goes out. The ſheriff cannot, however, make admeaſurement, but muſt extend all the lands, and return them to the court of common pleas; and upon that return admeaſurement will be made.

Id. 390.

§ 35. If the widow after aſſignment of dower improves the lands, ſo as to render them of greater value than the other two parts, ſtill no writ of admeaſurement of dower lies. It is the ſame if the improvement ariſes from the working of mines, which were open at the time of the aſſignment, (for a widow cannot open mines); becauſe this is only a caſual profit, which may not continue during the life of the dowreſs.

Of Damages in Actions for Dower. 1 Inſt. 32 *b.*

§ 36. By the common law, no damages could be given in a writ of dower, *unde nihil habet*; but it was provided by the ſtatute of *Merton*, 20 *Hen.* 3. c. 1., that the widow ſhould recover damages from the death of her

her huſband, provided the huſband died ſeiſed. This ſtatute does not extend to the writ of right of dower, becauſe damages can only be given for the detention of the poſſeſſion; and in writs of right, where the right itſelf is diſputed, no damages are given, becauſe no wrong is done until the right is determined.

§ 37. Damages are only due from the time when the claim of dower has been made, for the heir on whom the law caſts the freehold, is not bound to aſſign dower until it is demanded. But a demand in *pais*, before good evidence, is ſufficient.

1 Inſt. 32 *b.* Gilb. Uſes, 375.

§ 38. Upon a trial at bar, the iſſue was, whether there was a demand of dower and refuſal, to entitle the plaintiff to damages. The plaintiff proved an actual demand of the heir, being of the age of fourteen years, and then in her cuſtody; though, by his father's will, committed to another perſon. The infant ſaid his guardian would not let him aſſign dower.

Corſellis v. Corſellis, Bull. N. P. 117.

Reſolved unanimouſly upon debate, 1ſt, That dower was demandable of the heir though he was under age: 2d, That his guardian was but in the nature of a guardian in ſocage, and that the dower was not demandable of him, but of the heir, though not in the cuſtody of the guardian; and that, if the heir had entered upon the land to aſſign dower, he would not be a treſpaſſer upon the guardian, though the cuſtody of the land was committed to ſuch guardian, during the infancy of the heir: 3d, That the neglect of the heir in not aſſigning dower upon demand, though he

did not actually refuſe to do it, was ſuch a refuſal in law as to entitle the widow to damages (*a*).

§ 39. The ſtatute of *Merton* only enables the court in which a writ of dower is brought, to award ſuch damages as ſhall be aſſeſſed by a jury. So that, where a writ of error was brought on a judgment in dower, the court in which the writ of error was brought could not give any farther damages. But by the ſtatute 16 & 17 *Car.* 2. c. 8. § 3., it was enacted, that in writs of error brought on a judgment in dower, no execution ſhall be ſtaid unleſs the plaintiff in error becomes bound to pay ſuch coſts and damages as ſhall be awarded.

Vide f. 4. Same Stat.

1 Inſt. 33 *a.* § 40. If the heir or feoffee aſſigns dower, and the widow accepts thereof, ſhe cannot afterwards claim any damages; becauſe, having accepted the dower, which is the principal, ſhe cannot after ſue for damages, which are only acceſſary.

Mordant v. Thorold, 1 Salk. 252. 1 Show. 97. § 41. Damages of this kind are not conſidered as a debt, until they are aſcertained; ſo that, if the widow dies before the damages are aſcertained, her repreſentatives will not be entitled to them; for the writ of enquiry being in the nature of a perſonal action, it dies with the perſon.

(*a*) In ſeveral caſes damages have been given from the death of the huſband. Belfield v. Rowſe, 1 Inſt. 33 *a.* Dobſon v. Dobſon, Caſes temp. Hardw. 19.

§ 42. Where

§ 42. Where a woman was diſabled from ſuing for her dower at law, by not having acceſs to ſuch deeds as were neceſſary to prove her title, ſhe was always entitled to relief in equity. And now it is ſettled, that widows labour under ſo many diſadvantages at law, from the embarraſſments of truſt terms, &c. that they are fully entitled to every aſſiſtance which a court of equity can give them, not only in paving the way for them, to eſtabliſh their right at law, but alſo, by giving them complete relief, when the right is aſcertained: and in the exerciſe of this juriſdiction, courts of equity will even enforce diſcovery againſt a purchaſer for valuable conſideration without notice; and though the widow ſhould die before ſhe had eſtabliſhed her right to dower, equity will, in favour of her perſonal repreſentatives, decree an account of the rents and profits of the lands, of which ſhe afterwards appeared dowable, but will not allow her intereſt thereon.

A Widow may now obtain her Dower in Chancery.

Moor v. Black, Forreſt. 126.

Treat. of Eq. b. i. c. i. ſ. 3.

Mundy v. Mundy, 2 Veſ. jun. 122.

Wild v. Wells, Dickens R. 795.

§ 43. Where a mother was guardian of her infant child, and received the rents and profits of the eſtate, of which ſhe was dowable, but it was never aſſigned: the Chancellor held, that the want of a formal aſſignment of dower was nothing in equity, for ſtill the right in conſcience was the ſame. And if the heir brought a bill againſt the mother for an account of the profits, it was juſt that a court of equity ſhould, in the account, allow a third of the profits for the right of dower.

Duke of Hamilton v. Mohun, 1 P. Wms. 118.

TITLE

TITLE VI.

DOWER.

CHAP. V.

By what Means Dower may be barred.

§ 2. *Attainder of the Husband.*
6. *Attainder of the Wife.*
7. *Elopement with an Adulterer.*
17. *Detinue of Charters.*
19. *Fine and Recovery.*
20. *Bargain and Sale in London.*
21. *Jointure.*
22. *A Devise is no Bar of Dower.*
24. *If expressed to be in Bar of Dower the Widow must make her Election.*
§ 29. *Cases where the Widow is allowed to take both.*
32. *Modern Cases where a Devise has been held a Satisfaction.*
36. *A Bequest of Residue of Personal Estate is no Bar to Dower.*

Section 1.

THE right to dower attaches at the instant of the marriage; nor can it be defeated by the alienation of the husband alone; but still the wife may be barred from claiming dower, by several acts subsequent to the marriage.

Attainder of the Husband. Bract. 311 *a.* 1 Inst. 41 *a.* Hawk. P. C. b. 2. c. 49. f. 42. Rob. Gav. 230. Law of Forf.

§ 2. Formerly, if a man was attainted of treason, murder, or felony, his wife was thereby barred, not only of her dower at common law, but also, of her dower *ad ostium ecclesiæ, ex assensu patris*, and customary dower; except where the lands were gavelkind. "This rule, (says a modern writer), is to be justified "on the principle, that society may bestow rights on "what

"what limitations it thinks fit for its own ſafety, and, "on the ſtrength of conjugal ties, to deter men from "treaſon; and this is the only act by which the huſ- "band can, after marriage, affect his wife's title to "dower."

§ 3. By the ſtatute 1 *Edw.* 6. c. 12., the rigour of the common law was abated in this particular, it being thereby enacted, that in all caſes where the huſband was attainted of treaſon or felony, his wife ſhould have dower. But a ſubſequent ſtatute 5 & 6 *Edw.* 6. c. 11., revived this ſeverity againſt the widows of traitors, who are now barred of dower. And the words of the act being general, exclude the wife, as well in caſes of petit, as of high treaſon.

1 Inſt. 392 *b.*

§ 4. In caſes of miſpriſion of treaſon, or attainder of felony only, the ſtatute 1 *Edw.* 6. is in force, and therefore widows are entitled to dower; and where offences have been made felony, by modern acts of parliament, the wife's dower is expreſsly ſaved.

§ 5. It was reſolved in 3 & 4 *Philip* and *Mary*, that the widow of a man who was executed for treaſon ſhall not be endowed of lands which he aliened before the treaſon, though they are not forfeited.

Gate v. Wiſeman, Dyer, 140 *b.* 1 Inſt. 41 *a.* n. 3.

§ 6. If a woman be attainted of treaſon or felony, ſhe will hereby loſe her dower. But if pardoned, ſhe may then demand it, though her huſband ſhould have aliened in the mean time: for when this impediment

Attainder of the Wife. 1 Inſt. 33 *a.* 13 Rep. 23.

ment is once removed, her capacity to be endowed is reſtored.

Elopement with an Adulterer.

§ 7. We have ſeen that a divorce on account of adultery was not, at common law, a bar to dower. But by the ſtatute *Weſtminſter* 2. 13 *Edw.* 1. c. 34., it

2 Inſt. 433.

is enacted, that if a wife willingly leaves her huſband, and continues with her adulterer, ſhe ſhall be barred of her action to demand dower, if ſhe be convicted thereupon; except her huſband willingly, and without coercion of the church, reconcile her, and ſuffer her to dwell with him, in which caſe, ſhe ſhall be reſtored to her action.

2 Inſt. 435.

§ 8. Lord *Coke*, in commenting on this ſtatute, obſerves on the words, "*ſi ſponte reliquerit, et abierit et moretur cum adultero*;" that although the words of this branch be in the conjunctive, yet, if the woman be taken away not *ſponte*, but againſt her will, and after conſent and remain with the adulterer, without being reconciled, ſhe ſhall loſe her dower: for the cauſe of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry, without reconciliation.

2 Inſt. 436.

§ 9. Lord *Coke* alſo obſerves upon the words *moretur cum adultero*, that although ſhe does not continually remain in avowtry with the adulterer, yet, if ſhe be with him and commits adultery, it is a tarrying within this ſtatute: alſo, if ſhe once remains with the adulterer, and after he keeps her againſt her will; or if

the

the adulterer turns her away; yet ſhe ſhall be ſaid *morari cum adultero*, within this act.

§ 10. If the wife goes away with her huſband's agreement and conſent with *A. B.*, if, after, *A. B.* commits adultery with her, and ſhe remains with him without reconciliation, ſhe ſhall be barred of her dower. 2 Inſt. 435.

§ 11. In the rolls of parliament, 30 *Edw.* 1., is the following curious caſe. Paynell's caſe, Rot. Parl. vol. i. 146. No. 2.

William Paynell, and *Margaret* his wife, claimed dower in parliament out of the lands of *John De Cameys*, the firſt huſband of the ſaid *Margaret*. It was anſwered, that *Margaret* had quitted her firſt huſband, and had lived in adultery with her preſent huſband, without having ever been reconciled to *John De Cameys* her firſt huſband, ſo that ſhe had forfeited her dower by the ſtatute of *Weſtminſter*.

In reply, the demandants produced the following ſingular deed, by which *John De Cameys* had granted his wife to *Paynell*. " *Omnibus chriſti fidelibus ad quos* 2 Inſt. 435.
" *præſens ſcriptum pervenerit* Johannes de Cameys *filius*
" *et hæres domini* Randulphi de Cameys *ſalutem in do-*
" *mino. Noveritis me tradiſſe et dimiſiſſe ſpontanea vo-*
" *luntate mea domino* Will. Paynell *militi*, Margaretam
" de Cameys *filiam et hæredem domini* Johannis de Gat-
" teſden *uxorem meam, et etiam dediſſe et conceſſiſſe eidem*
" *domino* Will. *relaxaſſe et quietum clamaſſe omnia bona et*
" *catalla quæ ipſa* Margareta *habet vel de cetero habere*

" *poſſit, et etiam quicquid mei eſt de prædicta* Margareta " *bonis vel catallis cum ſuis pertinentiis, ita quod nec* " *ego nec aliquis alius in nomine meo in prædicta* Marga- " reta *bonis vel catallis ipſius* Margaretæ *cum ſuis per-* " *tinentiis de cetero exigere vel vindicare poterimus nec* " *debemus in perpetuum. Volo et concedo et per preſens* " *ſcriptum confirmo quod predicta* Margareta *cum pre-* " *dicto* Will. *ſit et maneat pro voluntate ipſius* Will. *In* " *cujus rei teſtimonium huic præſenti ſcripto ſigillum meum* " *appoſui. Hiis teſtibus,*" &c.

2 Inſt. 436. Gilb. Dow. 402. Perk. ſ. 355.

It was determined, 1ſt, that this was a void grant; 2d, that it did not amount to a licence, or at leaſt was a void licence; 3d, that, after her elopement, there ſhould not be any averment *quod non fuit adulterium*, though *William* and *Margaret* intermarried after the death of *John*: and, therefore, that ſhe was barred of her dower.

They alſo produced a ſentence of purgation of adultery, in the Eccleſiaſtical Court; but it was not allowed to have any effect.

2 Inſt. 436.

§ 12. Lord *Coke* further obſerves on this ſtatute, that if a woman, who has eloped from her huſband with an adulterer, is afterwards reconciled, and cohabits with her huſband by the coercion of the church; yet ſhe will be barred of her dower.

Idem.

§ 13. With reſpect to the circumſtances neceſſary to prove a voluntary reconciliation by the huſband, Lord *Coke* ſays, that the cohabitation is not ſufficient, without

without reconciliation made by the huſband *ſponte*, ſo as cohabitation only, in the ſame houſe with the huſband, availeth her not. But, in a caſe in *Dyer*, cohabitation as man and wife, appears to have been held a ſufficient proof of reconciliation.

§ 14. Thus, where a reconciliation was pleaded, it was given in evidence, that the huſband and wife had, after the elopement, lain together divers nights, and in divers places, and demeaned themſelves as man and wife. It was objected, that they never lived together in one houſe, but were apart, and the wife continued in adultery with one or more, during the life-time of the huſband: *Sed non allocatur*, for there might have been divers elopements, and divers reconciliations; and the defendant ought to take iſſue on one at his peril.

Haworth v. Herbert, Dyer, 106 *b*.

Vide 2 Inſt. 436.

§ 15. If the friends of the huſband eſloin him from his wife, ſo that the wife does not know what is become of him, and the friends of the huſband publiſh that the huſband is dead, and, after, they procure the wife to releaſe all marriages and intereſts which ſhe can have in him as her huſband; and after the wife, by the perſuaſion of the friends of the huſband, marries with another that dies, and ſhe takes another huſband, to whom notice is given that the firſt is living, but no notice was given thereof to the wife, though the wife lives in adultery, and though the huſband was not out of the realm or beyond ſea, ſo that the wife ought to take notice that he was living, yet, inaſmuch as ſhe *non reliquit virum ſponte*, as the ſtatute ſays, but by the perſuaſion of the friends of the huſband, that

Green v. Harvey, 9 Vin. Ab. 241.

he was dead, and it does not appear that ſhe ever knew that he was living, this is not any ſuch elopement as to bar her of her dower.

Coot v. Berty, 12 Mod. 232.

§ 16. In dower, the defendant pleaded elopement in the wife. The wife replied, that her huſband had bargained and ſold her to the adulterer, and held bad.

Detinue of Charters. Hob. 199.

Bedingfield's caſe, 9 Rep. 15. Dyer, 230 *a.*

§ 17. If, in a writ of dower, the tenant pleads that the demandant detains the charters of the eſtate, and ſhe denies ſuch detainer; if it is found againſt her, ſhe ſhall looſe her dower. But, 1ſt, The charters ought to concern the land whereof dower is demanded, and not other lands deſcended to the heir. 2d, He who pleads this plea, ought to ſhew the certainty of the charters whereupon a certain iſſue may be joined; or that they are in a cheſt or box, locked or ſealed, which imports ſufficient certainty: 3d, No ſtranger, although he be tenant of the land, and has the evidences conveyed to him, can, in a writ of dower, plead detinue of charters. Alſo, the heir in divers caſes, is in degree of a ſtranger, and therefore, ſhall not plead detinue of charters: 1ſt, If the heir has the land by purchaſe: 2d, If the heir has delivered the charters to the wife, for in that caſe the wife has them by his own act: 3d, If the heir be not immediately vouched: 4th, If the heir comes in as vouchee: 5th, If he comes in as tenant by receit. And the reaſon thereof is manifeſt, if the true form of pleading in that caſe be well obſerved: for he who pleads

pleads detinue of charters in bar of dower, ought to plead, that he has been always ready, and yet is, to render dower, if the demandant would deliver to him his charters.

Vide Perkins, f. 359, 360.

§ 18. Detinue of charters is no plea after imparlance; for he who pleads this plea, muſt plead that, from the time of the death of his anceſtor, he was ready to aſſign dower, if ſhe would deliver the charters.

Burdon v. Burdon, 1 Salk. 252.

§ 19. If a woman joins her huſband in levying a fine, or ſuffering a common recovery, ſhe will thereby effectually bar herſelf from dower out of the lands compriſed in ſuch fine or recovery. The principles upon which this doctrine is founded, will be explained under thoſe Titles.

Fine and Recovery.

§ 20. By the cuſtom of *London*, a married woman may bar herſelf of dower, by a deed of bargain and ſale acknowledged before the lord mayor, or the recorder, and one alderman; (the wife being examined ſeparately and apart from her huſband), and proclaimed and inrolled in the huſtings of pleas of land.

Bargain and Sale in London.

Bohun Priv. Lond. Emerſon 26.

§ 21. The moſt uſual mode of barring dower in modern times, is by means of a jointure, ſettled on the wife before marriage; of which, an account will be given in the next Title.

Jointure.

§ 22. Every deviſe or bequeſt in a will, imports a bounty, and therefore cannot, in general, be averred

A Deviſe is no Bar of Dower 1 Inſt. 36 *b.* 4 Rep. 4 *a.*

to be given as a ſatisfaction for that, to which the deviſee is by law entitled. Upon this principle, a deviſe cannot be averred to be in ſatisfaction of dower, unleſs it be ſo expreſſed in the will. 1ſt, Becauſe a deviſe implies a conſideration in itſelf, and cannot be averred to be for the uſe of any other perſon than the deviſee, unleſs it is ſo expreſſed in the will: no more can a deviſe be averred to be for ſatisfaction of dower, unleſs it is ſo expreſſed. 2d, As all wills of land muſt be in writing, no averment reſpecting the intention of the teſtator is admitted, which cannot be collected from the words of the will itſelf.

Vide Tit. 38.

Hitchin v. Hitchin, Prec. in Ch. 133.

§ 23. A perſon being indebted, deviſed part of his lands to his wife, but did not mention it to be in bar of dower; and deviſed the reſidue to his executors, until his debts were paid. The wife brought a writ of dower, and recovered: the heir filed a bill in Chancery to be relieved. But the court ſaid, the deviſe was not to be looked upon as a recompence or bar of dower, but as a voluntary gift.

If expreſſed to be in Bar of Dower, the Widow muſt make her Election.

§ 24. It follows, that an unconditional deviſe by a huſband to his wife, can in no inſtance operate in a court of law, as a bar of dower, although ſuch a deviſe be of more than a third of all the huſband's eſtate. But if it be expreſſed in the will, that the deviſe is made in lieu and ſatisfaction of dower, or on condition that the wife ſhall not claim dower, then the wife cannot have both; for that would be evidently repugnant to the intention of the teſtator. The wife muſt, therefore, in ſuch a caſe, make her election; and if ſhe enters

enters on the lands deviſed to her, ſhe thereby precludes herſelf from ever claiming dower. On the other hand, if ſhe brings a writ of dower, ſhe, by that act, determines her election, and cannot afterwards claim the deviſe. Wake v. Wake, 3 Bro. Rep. 255.

§ 25. A man deviſed a third part of all his lands to his wife, in recompence of her dower, and died. The wife entered on the lands deviſed to her; and it was reſolved that ſhe was thereby barred of her dower. Buſh's caſe, Dyer, 220. Pl. 12.

§ 26. A perſon deviſed his lands to *Mary* his wife, until *P.* his daughter came to the age of 19 years, and afterwards to *P.* in tail, remainder over in fee. And deviſed further, that *P.* ſhould pay, after her age of 19 years, to his wife, 12 *l. per annum*, in recompence of her dower; and if ſhe failed of payment, that *Mary* ſhould have the land for her life. The wife, before *P.* came to the age of 19 years, brought a writ of dower, and recovered a third part; and after *P.* came to the age of 19 years, the wife entered for nonpayment of the 12 *l.*; and the queſtion was, if her entry were lawful. Goſling v. Warburton, Cro. Eliz. 128.

Shuttleworth argued that it was; and that ſhe had not waived the benefit to have the lands by the deviſe, by bringing her writ of dower; for then ſhe had no title to it, but her title accrued by the nonpayment of the 12 *l.* *Walmſley*, *contra*. And afterwards it was adjudged, that ſhe having recovered a third part in dower, ſhould not have the rent by the will, as it was againſt the intention of the teſtator that ſhe ſhould have

both; and the acceptance of one was a waiver of the other; and in *Mich.* 31 & 32 *Eliz.*, error was brought, and the judgment was affirmed.

Leſquire v. Leſquire, Finch, 134.

§ 27. A man deviſed his perſonal eſtate to truſtees, in truſt that his widow ſhould receive thereout 100 *l. per annum* during her life, in lieu and diſcharge of her dower. The wife received this annuity for many years, and then brought a writ of dower. Decreed that the wife was barred of her dower, as long as the perſonal eſtate was ſufficient.

Ward v. Ward, Amb Rep. 299.

§ 28. A teſtator, after deviſing to his wife, declares in his will, that what he had before given her, ſhould be in full of all dower and right of dower or thirds, which ſhe might have or claim in or out of his real eſtate. Decreed by Lord *Hardwicke*, that the deviſe was a ſatisfaction of the widow's right to free-bench of a copyhold, which the teſtator had purchaſed after making his will: for free-bench was cuſtomary right *nomine dotis*, and ſo declared by *Bracton*.

Caſes where the Widow is allowed to take both.

§ 29. If, however, the intention of the teſtator does not clearly appear to have been, that the wife ſhould take the deviſe in lieu of dower, and not enjoy both; as, if the huſband deviſes lands to his wife during her widowhood only, or reſtrains the deviſe in any other manner, ſo as to render it leſs beneficial than dower, a court of equity will not interfere; but the wife will be allowed to take both the thing deviſed, and alſo her dower.

§ 30. *William*

§ 30. *William Lawrence* deviſed lands of the value of 130 *l.* to his wife, during her widowhood; and after the determination of that eſtate, he deviſed the ſame premiſes, together with all his other lands, to truſtees, for a term of years, in truſt for the payment of his debts and legacies: and, as a further proviſion for his wife, he directed that, after two years of the term were expired, his truſtees ſhould permit her to receive the rents and profits of another farm of 90 *l. per annum*, for the remainder of the ſaid term of 21 years, ſo long as ſhe ſhould continue a widow. The widow entered on the lands thus deviſed to her, and afterwards brought a writ of dower for a third part of the lands not deviſed to her; to which was pleaded the deviſe, with an averment, that the ſame was for her jointure; but upon a demurrer to this plea, judgment was given for the demandant. A bill was then exhibited in Chancery, to be relieved againſt this judgment; and Lord Chancellor *Somers* decreed a perpetual injunction againſt the widow, to ſtay her further proceedings upon the judgment in dower.

Lawrence v. Lawrence, 1 Ld. Ray. 438.

The cauſe was reheard before Lord Keeper *Wright*, who ordered a caſe to be ſtated, 1ſt, Whether the defendant was barred of her dower by the deviſe in the will or not: 2dly, And if ſhe was not barred of her dower by ſuch deviſe, whether the plaintiff ought to be relieved in that court. A caſe was accordingly ſtated. In 1702, the cauſe came on upon the caſe ſo ſtated; and his Lordſhip declared, that he had fully conſidered the matter, but conceived there was nothing in the teſtator's will that did intend that the defendant ſhould be barred

of her dower; and if any ſuch thing did appear by the will, the ſame would only be a bar at law, and not in that court; therefore his Lordſhip reverſed ſo much of the former decree as awarded a perpetual injunction againſt the defendant's proceeding at law upon her judgment in dower. This cauſe was brought on again by another remainder man, and was heard by Lord Chancellor *Cowper* in 1715, who declared, as to the point of dower, that it being a point of right, and ſo doubtful in its nature, as that the Court had been of different opinions about it, and the determination in 1702 having remained ſo long unqueſtioned, his Lordſhip did not think fit to make any variation from what was then determined as to that point.

3 Bro. Parl. Ca. 483.

On an appeal to the Houſe of Lords, it was contended, that it would be againſt the rules of natural equity and juſtice, if the reſpondent ſhould be permitted to enjoy the eſtates deviſed to her by her huſband's will, and at the ſame time diſappoint his intention, by inſiſting on her dower, for which the lands deviſed were far more than equivalent.

On the other ſide, it was ſaid to be no where expreſſed, nor to be collected from the words of the will, that the lands, deviſed to the reſpondent, were for her jointure, or in bar of her dower; neither could it be ſo averred at law, or in a court of equity, ſhe having no eſtate for life, but for her widowhood only: and the decree was accordingly affirmed.

§ 31. A man

§ 31. A man deviſed his eſtate to his firſt and other ſons in tail, remainder to his daughters in tail, remainder to his wife for life. It was decreed by Lord *Hardwicke*, that the wife was entitled to dower out of the eſtate thus given to her in remainder. And his Lordſhip obſerved, that the caſe of *Lawrence* v. *Lawrence* was fully in point.

Incledon v. Northcote, 3 Atk. 430. Boynton v. Boynton, 1 Bro. R. 445. Foſter v. Cook, 3 Bro. R. 347. French v. Davis, 2 Veſ. jun. 571.

§ 32. Notwithſtanding the doctrine eſtabliſhed in the caſe of *Lawrence* v. *Lawrence*, and the frequent recognition of it, deviſes have been ſince frequently deemed a ſatisfaction of dower, on account of very ſtrong and ſpecial circumſtances; as where allowing the wife to take a double proviſion, would have been quite inconſiſtent with the diſpoſitions of the will.

Modern Caſes where a Deviſe has been held a Satisfaction.

§ 33. A perſon, ſeiſed in fee, by his will gave and deviſed to his wife an annuity of 200 *l.* with a power of diſtreſs and entry, and, ſubject thereto, he deviſed his real eſtates to his daughter, in ſtrict ſettlement; and gave all his perſonal eſtate to Lord *Galway*, in truſt to inveſt it in lands to be ſettled to the ſame uſes. One of the queſtions in this caſe was, whether the wife was to take this annuity in ſatisfaction of her dower, or not.

Villa Real v. Ld. Galway, 1 Bro. Rep. 292. Note. S. C. Amb. Rep. 682.

Two caſes were cited; the firſt, that of *Pitts* v. *Snowden*, which was a deviſe by a man to his wife of an annuity of 50 *l.* a year, payable out of his copyhold and freehold meſſuages, with a clauſe of entry and diſtreſs; to be made good out of his perſonal eſtate, and ſubject to the annuity, he gave his freehold meſſuages to his three children. Lord *Hardwicke* decreed,

that the widow was entitled both to dower and the annuity. The ſecond was that of *Arnold* v. *Kempſtead*, where a teſtator gave ſome leaſehold eſtates to his wife for life, and then gave her 10 *l.* a-year during her life, or ſo long as ſhe ſhould continue a widow, out of the rents and profits of his freehold eſtates in *Queen's Square*, but without any clauſe of entry or diſtreſs; and deviſed all his freehold eſtates in *Queen's Square* to his ſon. Lord *Northington* decreed, that the widow muſt elect, either her dower, or the annuity; but could not take both.

Lord *Camden.*—The caſe now before the court is more exactly correſpondent, in the form of the deviſe, to *Pitts* v. *Snowden*, than to the other caſe; for, in theſe two caſes, there is an expreſs clauſe of entry and diſtreſs, whereas there is no ſuch power in *Arnold* v. *Kempſtead;* and they more particularly reſemble each other in another circumſtance, as the annuity in both is charged upon other funds, not ſubject to dower, as well as upon the dowable eſtate; whereas, in *Arnold* v. *Kempſtead*, the annuity is made to iſſue only out of the freehold eſtate, ſubject to dower. Theſe two, being alike in all their circumſtances, I muſt admit that *Pitts* v. *Snowden* is an authority in point one way, *Arnold* and *Kempſtead* the other. The queſtion upon this caſe is this, 1ſt, whether, if a rent-charge is given to the widow, iſſuing out of the eſtate ſubject to dower, with power of diſtreſs, this deviſe ſhall operate as a bar or ſatisfaction of dower. I am of opinion that it ſhall; becauſe the claim of dower, 1ſt, diſappoints the will, and, 2dly, is inconſiſtent with it. It is admitted that

every

every deviſee muſt confirm the will *in toto*, if he claims any intereſt under it; and will conſequently forfeit ſuch intereſt if he impeaches or intercepts any part of it. In this caſe, the will is contradicted by the claim of dower, 1ſt, becauſe it puts the truſtees out of poſſeſſion, for they cannot hold the whole, ſubject to the annuity and diſtreſs, without being in poſſeſſion of the whole; nor can the annuitant, conſiſtent with the will, take poſſeſſion of any part, becauſe her right accrues upon default of payment. And though the preſent caſe gives the right of entry upon the whole or any part, in more explicit terms than *Pitts* v. *Snowden*, yet the general power of entry and diſtreſs in *Pitts* v. *Snowden* is tantamount in this particular. The poſſeſſion, therefore of the truſtees, being co-extenſive with the annuities and the diſtreſs, it is not poſſible, in ſuch a caſe, to make the land ſubject to the dower and the rent-charge at the ſame time; becauſe, as annuitant, the widow muſt be out of poſſeſſion of the whole; as dowreſs, ſhe muſt be poſſeſſed of a part. Hence it follows, that where the teſtator gives the eſtate ſubject to the annuity, as he doth in this caſe, he muſt be intended to give, ſubject to the annuity only; and the reſidue of the rents and profits being given to the deviſee, muſt exclude all charges, except only the annuity. In this view of the matter, the widow, by the claim of dower, diſappoints the will in the moſt eſſential part of the teſtator's plan, by reducing the intereſt of the deviſee, and loading the eſtate with an additional burden. 2dly, The claim of dower is inconſiſtent with the will in another light, as it will diminiſh the annuity itſelf, which is contrary to the very words of the will.

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The annuity is either given over and above the dower, or in ſatisfaction of it: he intended only one, or he intended both; if both, he intended both ſhould be enjoyed in their full extent, the whole annuity and the whole dower. Now, can the widow enjoy the annuity, as the will has given it, if ſhe claims her dower? It is moſt clear that ſhe cannot; for if ſhe enters into a third in right of her dower, ſhe muſt ſink ſo much of her annuity, as that third ought to bear in proportion. That is a violation of the will; and whether the annuity claſhes with the dower, or the dower with the annuity, it is equally deciſive, for ſhe can never enjoy both, unleſs both can be reconciled to the will. Nor is there any pretence to ſay that the whole annuity, by an equitable marſhalment, ſhall be thrown upon the two remaining thirds; becauſe that would in terms contradict the will, which charges the whole, and gives the power of diſtreſs on the whole. This is ſufficient to ſhew the teſtator's intention: it is an intention that does not ſtand upon a looſe preſumption, but from the mode of deviſing in the will itſelf; and then the caſe comes within the rule of *Noys* and *Mordaunt*, that no perſon ſhall diſpute a will that takes under it. This rule is univerſal and without exception, and a dowreſs has no more right to be exempted from it than any other deviſee. The caſes of *Lawrence* v. *Lawrence*, *Hitchin* v. *Hitchin*, *Lemon* v. *Lemon*, *&c.* may be all admitted to be good law; the will, in all theſe caſes, being conſiſtent with the claim of dower. In all theſe caſes the dowable eſtate was deviſed generally; and as the teſtator had not expreſſed the wife's bequeſt to be in ſatisfaction, the Court would not preſume it, and the

eſtate

eſtate paſſed *cum onere*. There no violence is done to the will, and the wife takes no more from the deviſee than the teſtator intended ſhe ſhould; nothing being declared to the contrary. But where the dowable eſtate is ſo divided that the claim of dower makes a material change in the will itſelf, as it does here, the widow muſt be barred by neceſſary implication. For where is the difference between declaring that ſhe ſhall not hold both, and deviſing ſo that ſhe cannot hold both, without diſturbing the will. And, therefore, if the claim of dower will diſappoint the will, ſhe is barred of her dower by neceſſary implication; which will, according to the doctrine of all the caſes, be equivalent to an expreſs implication. I will now ſay a word upon the caſe of *Arnold* v. *Kempſtead*. There is no power of diſtreſs in that will, and yet I do not think it ſubſtantially within the reaſon of the other two caſes; for the very gift of an annuity to the wife out of the dowable eſtate, does, from the nature of the intereſt, throw her out of poſſeſſion, and makes the claim of dower inconſiſtent with the will. I muſt not conclude without taking notice of a circumſtance that may be urged againſt my opinion, as a proof of intention in the teſtator, to give both dower and annuity to the wife, and that is, that the annuity is made to iſſue out of more than the dowable eſtate; from whence it may be argued, that the teſtator enlarged the fund for payment, in order to leave ſufficient for the ſatisfaction of both the demands. I anſwer, firſt, that it is totally unknown whether he extended the charge and the remedy with that view; it is, at moſt, but conjecture; and it may as reaſonably be ſuppoſed that he meant only, by augmenting

augmenting the ſecurity, to give an eaſier and ſafer remedy for recovering the annuity, as nothing is more common, where a rent-charge is granted, than to charge an eſtate of ten times the value for the payment of it. 2dly, That this ſuppoſed intention is rebutted by a declared intention to the contrary, manifeſted and expreſſed in the will itſelf. I wiſh theſe caſes could have been reconciled; feeling in myſelf a modeſt unwillingneſs to ſet in judgment upon two men greatly ſuperior to myſelf in learning as well as capacity; but that, which in a private man, would have been preſumption, is an indiſpenſible duty in a judge; the tax is impoſed upon me by my office, and I undertake it with more eaſe of mind, knowing that there is a juriſdiction ſuperior to us all, which is able to confirm or reverſe my opinion by a final deciſion.

Vide Jones v. Collier, Amb. Rep. 730. Wake v. Wake, 3 Bro. Rep. 255. 1 Veſ. jun. 335.

Pearſon v. Pearſon, 1 Bro. R. 292.

§ 34. A teſtator gave by his will ten acres of land to his ſon, ſubject to a rent-charge of 10 *l. per annum* to his wife for life, and 5 *l. per annum* to his brother. The widow filed a bill for this annuity and her dower; and the queſtion was, whether the rent-charge to the wife was a bar of dower, it not being ſo expreſſed in the will. The caſes of *Lawrence* v. *Lawrence*, and *Davis* v. *Edwards*, were cited to ſhow that a rent-charge will not bar dower, unleſs ſo expreſſed. On the other ſide was cited *Villa Real* v. Lord *Galway*.

Lord *Loughborough*.—The law is perfectly ſettled and very plain. The gift of an annuity to the wife may be a bar of dower, or may not, according to the language

language of the will. *Arnold* and *Kempſtead*, (cited in the ſame note upon *Co. Lit.* 36 *b.*) In *Villa Real* v. Lord *Galway*, it was held to be a bar, becauſe, otherwiſe, the other deviſes in the will could not take effect. In this caſe, if the value of the lands ſhould not be ſufficient to ſatisfy the two annuities and the dower, it would prove it was intended to be in bar; otherwiſe, there is nothing in the will to ſhew ſuch intention, and there muſt be ſuch an intent to make it a bar to dower.

§ 35. Sir *G. Boynton*, by his will, gave his wife his manſion-houſe, *&c.* for life; he alſo gave to his ſaid wife an annuity of 1000 *l.* charged on all his real eſtates, in lieu of her dower, and thirds; together with the uſe of her jewels, and of his houſehold goods, plate, carriages, *&c.* for life; and a legacy of 200 *l.* to be paid immediately after his deceaſe: then came the following:—"Provided that if my ſaid wife ſhall "happen to marry again, that then, and from thence-"forth, all and every the deviſe, annuity, powers, "authorities, and bequeſts, by me herein-before or "herein-after given and bequeathed to my ſaid wife, "(except the annuity of 100 *l.* a year herein-after "mentioned), ſhall ceaſe and be void. And, in ſuch "caſe, I give and bequeath to my ſaid wife, during "her natural life, one annuity or yearly rent-charge "of 100 *l.*, charged upon all my real eſtates, to be "paid, *&c.* The ſaid annuity of 100 *l.* to be in full "for any benefit and advantage, which I mean ſhall "ariſe out of my real or perſonal eſtate, in caſe ſhe ſhall "happen

Boynton v. Boynton, 1 Bro. Rep. 445.

" happen to marry again." And made his ſaid wife executrix and reſiduary legatee of his ſaid will, and guardian to the plaintiff his eldeſt ſon, and to his other children. Sir *G. Boynton*, the eldeſt ſon, filed his bill, praying, among other things, that the defendant, Lady *Boynton*, might make her election, either to accept the benefits under the will, or to claim her dower. Lady *Boynton*, by her anſwer, elected to take her dower, inſtead of the benefits given to her by her huſband's will. Sir *T. Sewell* M. R. declared that, as no account of the teſtator's perſonal eſtate and of his debts, *&c.* had been taken, the defendant, Lady *Boynton*, was not obliged to make any election, until the account ſhould be taken; and it ſhould appear, out of what real eſtates ſhe was dowable at the time of the teſtator's deceaſe. The maſter made his report, and ſoon after Lady *Boynton* married again. The plaintiff filed a ſupplemental bill, making Lady *Boynton*'s huſband a party, ſtating the marriage, and that in conſequence thereof, the benefits ariſing to the defendant Lady *Boynton* under the will, had become void. In her anſwer to this bill, Lady *Boynton* claimed her dower, and ſubmitted to the Court whether ſhe was not alſo entitled to the annuity of 100 *l.* given by the teſtator's will.

Lord *Thurlow* declared, that Lady *Boynton*, having elected to take her dower, was not entitled to have the legacy, annuity, and proviſion made by the will. And, upon a re-hearing, his Lordſhip ſaid, the queſtion is, whether the teſtator has declared, by expreſs words, or any thing tantamount, that Lady *Boynton* ſhall have both

both the dower and this annuity? The queſtion turns upon the clauſe whereby he gives her, in the event of her marrying again, 100 *l.* a year, as the full benefit ſhe was to derive from his eſtate. By the expreſſions, I rather think he intended his eſtate ſhould be quite clear of her. On the other hand, it is ſaid, this could not be his intent, as he knew this was not equal to her dower; but the caſes do not ſeem to have gone upon any calculation of value between the legacy and the dower. The natural conſtruction of the words ſeemed to be, that if ſhe married again, ſhe ſhould only have 100 *l.* a year, in this the teſtator's intention is defeated; but ſhe cannot have her dower and the annuity.

A Bequeſt of the Reſidue of Perſonal Eſtate is no Bar to Dower.

§ 36. A gift of the reſidue of perſonal eſtate, will not alone be conſtrued as a bar or ſatisfaction of dower.

Ayres v. Willis, 1 Vez. 230.

§ 37. A man, by his will, taking no notice of his wife's title to dower, makes a proviſion for her out of the perſonal eſtate by way of reſidue. This was inſiſted upon to be an implication to bar her of dower.

Lord *Hardwicke*.—No caſe to that purpoſe. This differs greatly from *Noys* and *Mordaunt*, and the ſeveral other caſes, ſince which the rule has been, that if a proviſion (even perſonal, according to latter determinations) is made for a child, whoſe eſtate, by the ſame will, is deviſed away, if he claims under

the will, he cannot have the other. But here, by the claim of dower, the wife does not break in on the will; and this is the ſtronger, as it is only a reſidue; which accidental benefit he might intend ſhe ſhould have as well as dower.

TITLE VII.

JOINTURE.

CHAP. I.

Of the Origin and Nature of Jointures.

CHAP. II.

In what Caſes a Jointreſs is entitled to the Aid of a Court of Equity.

CHAP. III.

What will operate as a Bar or Satisfaction of a Jointure.

CHAP. I.

Of the Origin and Nature of Jointures.

§ 1. *Origin of Jointures.*
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40. *Who may take a Jointure.*
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Section 1.

Origin of Jointures. 4 Rep. 1.

IN conſequence of two maxims of the common law, 1ſt, that no right can be barred until it accrues, and, 2dly, that no right or title to an eſtate of freehold can be barred by a collateral ſatisfaction; it was found abſolutely impoſſible to bar a woman of her dower, by any aſſignment or aſſurance of lands, either before or during the marriage; though expreſsly mentioned to be in full bar and ſatisfaction of dower. For a wife having acquired a right to be endowed of a third part of all her huſband's lands, at the moment of her marriage, this right, like all others, could only be extinguiſhed by a releaſe thereof; and no ſuch releaſe of the wife, either before or during the marriage, would be valid. For if it was made before the marriage, it was no bar; becauſe, at the time of making it, the wife had no title to dower; and, therefore, a releaſe from her then, could be no bar to a right which accrued to her after. If it was made during the marriage, it was abſolutely void; the wife not being then *ſui juris*. And no eſtate limited to the wife during the marriage, could bar her of dower; becauſe no right or title to a freehold eſtate can be deſtroyed by acceptance of a collateral ſatisfaction.

§ 2. Every woman became therefore entitled, immediately upon her marriage, to one third of all her huſband's real eſtates, however ſmall her own fortune might be. Such an inequality was one of the reaſons why ſo much land was conveyed to uſes, a widow not being

being dowable of a uſe, And when the practice of veſting eſtates in feoffees to uſes became general, it was uſual, on all marriages, for the friends of the wife to procure the huſband to take an eſtate from his feoffees, and to ſettle it to himſelf and his wife, for their lives, in joint-tenancy or jointure, (from whence the word jointure aroſe), leaſt the wife ſhould be totally unprovided for at the death of her huſband.

Vide Tit. 11.

4 Rep. 1 *b.*

§ 3. When the ſtatute of uſes enacted that all thoſe who were entitled to the uſe of any lands or tenements ſhould have the legal ſeiſin and poſſeſſion of them, all women, who were then married, would have become dowable of ſuch lands as were held to the uſe of their huſband's; and would, at the ſame time, be entitled to any particular lands that were ſettled on them in jointure. But as this would have been a manifeſt wrong, the following clauſe was inſerted in the ſtatute of uſes, to prevent that conſequence.

§ 4. " Whereas divers perſons have purchaſed or " have eſtate made and conveyed of and in divers " lands, tenements, and hereditaments, unto them and " to their wives, and to the heirs of the huſband, or to " the huſband and to the wife and to the heirs of their " two bodies begotten, or to the heirs of one of their " bodies begotten, or to the huſband and to the wife " for term of their lives, or for term of life of the ſaid " wife; or where any ſuch eſtate or purchaſe of any " lands, tenements, or hereditaments hath been or " hereafter ſhall be made to any huſband and to his " wife, in manner and form above expreſſed, or to

Statute 27 Hen. 8. Ch. 10. ſ. 6.

" any other perſon or perſons and to their heirs and " aſſigns, to the uſe and behoof of the ſaid huſband " and wife, or to the uſe of the wife, as is before re- " hearſed, for the jointure of the wife, that then, and " in every ſuch caſe, every woman married, having " ſuch jointure made or hereafter to be made, ſhall " not claim nor have title to have any dower of the " reſidue of the lands, tenements, or hereditaments " that at any time were her ſaid huſband's by whom " ſhe hath any ſuch jointure, nor ſhall demand nor " claim her dower of and againſt them that have the " lands and inheritances of her ſaid huſband. But if " ſhe have no ſuch jointure, then ſhe ſhall be admitted " and enabled to purſue, have, and demand her dower, " by writ of dower, after the due courſe and order of " the common laws of this realm,

Id. c. 7. " Provided always, that if any ſuch woman be " lawfully expulſed or evicted from her ſaid jointure, " or from any part thereof, without any fraud or covin, " by lawful entry, action, or by diſcontinuance of her " huſband, then every ſuch woman ſhall be endowed " of as much of the reſidue of her huſband's tene- " ments or hereditaments, whereof ſhe was before " dowable, as the ſame lands and tenements ſo evicted " and expulſed ſhall amount or extend unto."

Definition of Jointure. 1 Inſt. 37 *a.* § 5. This ſtatute has given riſe to the modern jointure, which Lord *Coke* defines to be " a competent " livelihood, of freehold, for the wife, of lands, or tene- " ments, *&c.* to take effect preſently in poſſeſſion or " profit, after the deceaſe of her huſband, for the life

of

" of the wife at the leaſt; if ſhe herſelf be not the
" cauſe of determination of forfeiture of it.

§ 6. As the ſtatute 27 *Hen.* 8. reſpecting jointures, contradicts the common law, it has been conſtrued ſtrictly; and, therefore, Lord *Coke* lays it down, that no eſtate limited to a woman ſhall be deemed a good jointure, and a bar to dower under this act, unleſs it has the following requiſites.

Requiſites to a Jointure.

1 Inſt. 36 *b.*

§ 7. It muſt take effect, in poſſeſſion or profit, immediately from the death of the huſband; for, otherwiſe, it will not be ſo beneficial a dower. If, therefore, an eſtate is conveyed to the huſband for life, remainder to *J. S.* for life, remainder to the wife for life, in ſatisfaction of dower, this is no jointure within the ſtatute: becauſe, by the firſt limitation, it was not to take effect in poſſeſſion or profit preſently after the death of her huſband. And although, in this caſe, *J. S.* ſhould die in the life-time of the huſband, and after the death of the huſband the wife ſhould enter, yet it would be no bar of dower, but ſhe ſhould have her dower alſo; becauſe it was not within the ſtatute, and, by the common law, it was no bar of dower.

It muſt take Effect from the Death of the Huſband.

1 Inſt. 36 *b.* 4 Rep. 2 *a.*

§ 8. So, where an eſtate was limited to the huſband in tail, and, for default of ſuch iſſue, to the wife for life, it was held not to be a jointure, although the huſband died without iſſue in the life-time of his wife.

Wood v. Shirley, Cro. Jac. 488.

§ 9. Sir *H. Bowyer* covenanted to ſtand ſeiſed to the uſe of himſelf in tail, and for default of ſuch iſſue, to the uſe of his wife for life. Sir *H. Bowyer* afterwards made a feoffment of the ſame lands to truſtees, to the uſe of himſelf and his wife for their lives, without impeachment of waſte, by way of jointure. After the death of Sir *H. Bowyer*, his wife entered. And it was adjudged, that ſhe was remitted inſtantly to the eſtate for life limited to her by the covenant to ſtand ſeiſed; and that it was not a jointure, becauſe it was to begin after the determination of an eſtate tail; and, although the eſtate tail was determined by the death of the huſband without iſſue, ſo that her eſtate began immediately upon the death of her huſband, yet, foraſmuch as it could not be ſaid to be a jointure at the beginning, whatever happened afterwards could not make it a good jointure.

Carruthers v. Carruthers, 4 Bro. Rep. 500.

And be for the Life of the Wife.

1 Inſt. 36 *b*.

§ 10. The ſecond circumſtance neceſſary to a jointure is, that it muſt be limited for term of the wife's life, or for ſome greater eſtate. But if an eſtate be limited to a woman for the life or lives of one or more perſons, or for a hundred or a thouſand years, *&c.* if ſhe lives ſo long, or without ſuch limitation, it is no bar of her dower.

4 Rep. 3 *a*.

§ 11. It is immaterial in what manner the eſtate is limited to the wife; for although the ſtatute recites five modes of limiting an eſtate in jointure, yet theſe are only mentioned as examples, and do not exclude any other eſtate which is conſiſtent with the intention of the ſtatute.

§ 12. In

§ 12. In the Ducheſs of *Somerſet*'s caſe, which was determined 1 *Mary*, it was reſolved by all the judges, that an eſtate, limited to a man and his wife, and to the heirs male of their two bodies begotten, was a good jointure within the ſtatute; although it was not one of the eſtates mentioned in the ſtatute. Dyer 97 *a.*

§ 13. In *Vernon*'s caſe, it was determined, that an eſtate, limited to the huſband for life, remainder to the wife for life, was a good jointure; although it was not one of the eſtates mentioned in the ſtatute; becauſe it is equally beneficial with them. 4 Rep. 2 *a.*

§ 14. It is ſaid, in *Brook*'s Abridgement, that an eſtate, limited to a huſband and wife and their heirs, is not a jointure within the ſtatute; becauſe it is not one of the eſtates mentioned in the ſtatute. But *Dyer* has contradicted this poſition, and proved that ſuch an eſtate would be a good jointure, and within the expreſs letter of the act; the words of the act being "for "term of life or otherwiſe in jointure;" which word otherwiſe extended to all other eſtates conveyed to the wife, not mentioned before in the act, which are as beneficial or more to the wife, as the eſtates before mentioned. Tit. Dower, Pl. 69. 248 *a.* 4 Rep. 3 *b.*

§ 15. The third circumſtance neceſſary to a good jointure, according to Lord *Coke*, is, that the eſtate muſt be limited to the wife herſelf, and not to any other perſon in truſt for her. So that if an eſtate be made to others in fee-ſimple, or for her life, in truſt, ſo as the eſtate remain in them, although it be for her It muſt be limited to the Wife herſelf. 1 Inſt. 36 *b.* 1 Atk. 561.

her benefit, and by her aſſent, yet it is no bar of dower.

This Rule not in force in Equity.

§ 16. Mr. *Hargrave* obſerves, on this paſſage, that though this may be true at law, yet it is now ſettled, that a truſt eſtate, being equally certain and beneficial as what is required at law, or even an agreement to ſettle lands as a Jointure, is a good equitable jointure in bar of dower.

Bucks v. Drury, Infra.

§ 17. In a modern caſe, it was determined by the Houſe of Lords, that a covenant from Sir *Thomas Drury*, the huſband, that his heirs, executors, or adminiſtrators would pay an annuity to his wife for her life, in caſe ſhe ſurvived him, in full for her jointure, and in bar of dower, without expreſſing that it ſhould be charged on lands, was a good equitable jointure within the ſtatute. And Lord *Hardwicke* anſwered the objection of its being in the huſband's power to have defeated this agreement, and ſold or given away his whole eſtate, by Lord *Lecchmere*'s and other caſes, where the agreement reſted as here on the huſband's covenant; and further, by obſerving that ſuch an alienation would have been an eviction of the fund, out of which the jointure was to ariſe, and conſequently let the wife into her dower; and nobody would have dealt with Sir *Thomas Drury* without deſiring to ſee his marriage articles, whereby the covenant would appear, and enquiring whether it was or was not performed. Another objection, that Sir *Thomas Drury* had not bound *himſelf* to do any act, but only that his heirs, executors, and adminiſtrators ſhould pay, *&c.* he anſwered

4 Brown's Rep. 506. note.

ſwered by ſaying, that upon the former clauſe ſtipulating that if ſhe ſurvived, ſhe ſhould have an annuity, *&c.* Lady *Drury* might, the day after the marriage, have brought a bill by her next friend, and compelled Sir *Thomas Drury* himſelf to ſettle the annuity.

§ 18. The fourth circumſtance neceſſary to a jointure is, that it muſt be made in ſatisfaction of the wife's whole dower, and not of part of her dower. For land conveyed to a woman in part of her jointure, or in ſatisfaction of part of her dower, is no bar, on account of the uncertainty, of any part of her dower.

It muſt be in Satisfaction of the whole Dower.
1 Inſt. 36*b*.
4 Rep. 3*a*.

§ 19. It is ſaid, in *Vernon's* caſe, that if lands are conveyed to a woman before marriage, as part of her jointure, and after marriage more land is conveyed to her, for her full jointure, and in ſatisfaction for her whole dower, and afterwards her huſband dies: in that caſe, if the wife waives the land conveyed to her after the marriage, (which ſhe may do), ſhe ſhall have the land conveyed to her before marriage, and her dower alſo in the reſidue.

Id.
Infra.

§ 20. The fifth circumſtance neceſſary to a jointure, is, that the eſtate limited to the wife muſt be expreſſed in the deed to be in ſatisfaction of her whole dower.

And ſo expreſſed.
1 Inſt. 36*b*.

§ 21. An averment might formerly have been made, that an eſtate limited to the wife was in bar of dower. But,

Vernon's caſe, 4 Rep. 1. Anon. Owen R. 33.

But, ſince the ſtatute of frauds and perjuries, no averment can be admitted, that a proviſion made for a wife previous to her marriage was intended as a jointure, and in bar of dower.

9 Mod. 152.

Tinney v. Tinney, 3 Atk. 8.

§ 22. On a bill brought for dower, the defendant inſiſted, that the huſband, in his life-time, gave a bond in the penalty of 1000 l., in truſt to ſecure 500 l. to the wife in caſe ſhe ſurvived him: that it was intended, at the ſame time, to be in lieu of dower, and that ſhe acknowledged it to be ſo; and offered to read evidence of her acknowledgment.

Lord *Hardwicke* ſaid, that parol evidence could not be allowed in this caſe, being within the ſtatute of frauds and perjuries; and that a general proviſion for a wife was not a bar to dower, unleſs it was ſo expreſſed. His Lordſhip, however, ſtated, that in the caſe of *Vizard* v. *Longdale*, Sir *J. Jekyll* held the words in a bond to ſecure a ſum of money for the livelihood and maintenance of the woman, was no bar of dower. But Lord Chancellor *King* was of a different opinion, and ſaid, it was within the equity of the ſtatute 27 *Hen.* 8., of jointures, and therefore reverſed the decree.

§ 23. A limitation of an eſtate to a woman for life, with a ſubſequent proviſo, that it ſhall be in ſatisfaction of dower, has been held to be a good jointure, though not limited expreſsly in lieu of dower, but only ſaid ſo in the proviſo.

§ 24. *J. S.*

§ 24. *J. S.* was ſeiſed of copyhold lands belonging to the manor of *Whitchurch*; in which manor, there is the following cuſtom: viz. The firſt wife of every tenant ſhall have her free-bench in all the lands whereof her huſband was ſeiſed during the coverture; the ſecond wife a moiety, and the third a part, ſo long as ſhe kept her huſband above ground. *J. S.*, in conſideration of a marriage, and marriage portion, covenanted with truſtees, that within two months after the marriage, he would ſettle all his lands to the following uſes: viz. As to part of the lands, to the uſe of himſelf and of his wife for their lives, remainder to the firſt ſon, &c. in tail male; and as to the other moiety, to the uſe of himſelf for life, remainder to his firſt ſon, &c. with a proviſo, that the lands ſo ſettled on the wife ſhould be in lieu of her cuſtomary eſtate. And one of the points in this caſe was, whether this jointure, not being made expreſsly in lieu of dower, but only ſaid ſo in the proviſo, and ſhe being an infant at the time of making the articles, and not a party to them, ſhe ſhould be excluded from claiming her free-bench; and it was holden, that ſhe ſhould be obliged to abide by her jointure.

Jordan v. Savage, Bac. Ab. vol. 3. 717.

§ 25. The ſixth circumſtance neceſſary to a jointure is, that it muſt be made before marriage. For it is enacted by the 9th ſection of the ſtatute, that if the jointure be made after marriage, (except by act of parliament), the wife may refuſe it, and demand her dower.

It muſt be made before Marriage.

1 Inſt. 36 *b.* 4 Rep. 3 *a.*

§ 26. It

From whom a Jointure muſt come. Moore, 28. Bridges's caſe, Mo. 718. Aſhton's caſe, Dyer, 238.

§ 26. It is not neceſſary that the eſtate limited as a jointure, ſhould proceed immediately from the huſband, for if it comes through the mediuſn of truſtees, or the demandant in a common recovery, it will be good. So, if the eſtate proceeds from the father of the huſband, it will be good.

Jointures which require the Acceptance of the Wife.

§ 27. A jointure attended with all the circumſtances above ſtated, is binding on the wife, and is a complete bar to her claim of dower; or rather prevents her title to dower from ever ariſing. But there are other modes of limiting an eſtate to a wife, which Lord *Coke* ſays are good jointures within the ſtatute, provided the wife accepts of them after the death of her huſband. But ſhe is at liberty to reject them, and, in that caſe, ſhe becomes entitled to dower.

§ 28. Thus an eſtate ſettled on the wife, after marriage, as a jointure, may, by the expreſs words of the ſtatute, be rejected by the wife, after her huſband's death; in which caſe, ſhe may claim her dower. But if ſhe once accepts of ſuch jointure, ſhe is thereby barred of dower.

§ 29. An eſtate for life limited to a woman for her jointure, upon condition to perform her huſband's will, or which is determinable by any other means whatever during the life of the wife, is a jointure within the ſtatute, if the wife accepts of it after the death of her huſband.

§ 30. In

§ 30. In a writ of dower, the tenant pleaded, that the huſband of the demandant was alſo ſeiſed of lands in the ſame county, which he had conveyed to the uſe of himſelf for life, remainder to his wife for life; and averred, that the eſtate for life ſo limited to the demandant, was for her jointure, and in full ſatisfaction of dower; and that, after the death of the huſband, *ſhe had entered into the lands ſo limited to her for her jointure*, and agreed to it. The demandant replied, and confeſſed the conveyance, by which ſhe took an eſtate for life; but ſaid, that the eſtate was upon condition that ſhe ſhould perform the laſt will of her huſband; and ſhewed the will in certain, in which divers things were to be performed by the demandant; and demanded judgment, if the tenant ſhould be admitted and received to aver, that this eſtate ſo limited to the wife, upon the ſaid condition, was for the jointure of the wife, and in ſatisfaction of her dower: upon which matter, the tenant demurred in law.

Vernon's caſe, 4 Rep. 1. Dyer, 317 *a*.

It was reſolved, that although the eſtate limited to the wife was upon condition, and although dower, in lieu of which the jointure is given, is an abſolute eſtate for life, yet, foraſmuch as an eſtate for life upon condition, is an eſtate for life, it was within the words and intent of the act, if the wife, after the death of the huſband, accepted it. It was alſo ſaid, that if a man makes a feoffment in fee, to the uſe of himſelf for life, and after to the uſe of his wife, *durante viduitate*, for her jointure, it was good within the 27 *Hen.* 8.: And the ſame law of an eſtate conveyed to the wife for her life, on condition. But, in

in theſe caſes, the wife is not bound to accept ſuch jointure, but may demand her dower.

§ 31. Lord *Coke*, in his report of *Vernon*'s caſe, ſays, it was determined in 38 & 39 *Eliz.*, that if a man deviſes land to a woman for life, or in tail, for her jointure, and in ſatisfaction of her dower, it is a jointure within the ſtatute 27 *Hen.* 8. For, as an eſtate for life made to a woman for her jointure before marriage, when ſhe is not his wife, is within the equity of the ſaid act, ſo, an eſtate for life deviſed to a woman for her life, which takes effect after his death when the marriage is diſſolved, is alſo within the equity of the ſaid act: for ſuch eſtate well agrees with the intent of the makers of the ſaid act, and with the deſcription of a jointure made by the judges in *Vernon*'s caſe.

Leake v. Randall, cited 4 Rep. 4 *a.*

§ 32. It appears, from what has been above ſtated, that there are two ſorts of jointures within the ſtatute 27 *Hen.* 8.: one, which prevents the title to dower from ever ariſing; and another which, when accepted, but not before, becomes a bar to dower. An eſtate for life upon condition, as in *Vernon's* caſe, and an eſtate limited after marriage, for a jointure, and in bar of dower, are inſtances of the latter ſort. Where an eſtate is limited to a woman, which does not fall within either of thoſe deſcriptions, ſhe becomes entitled to ſuch eſtate, and alſo to her dower. Thus, in *Vernon*'s caſe, it was reſolved, that if the eſtate there limited to the wife, was not within the ſtatute 27 *Hen.* 8., then, by the common law, it was no bar of dower, but

Caſes where a Widow takes the Eſtate and Dower.

4 Rep. 2 *a.*

but the demandant ſhould have both. And Lord *Coke* obſerves, that where a jointure does not take effect immediately on the death of the huſband, the wife ſhall take ſuch eſtate, and alſo her dower. 1 Inſt. 36 *b.*

§ 33. We have ſeen, that an eſtate in fee, in tail, or for life, may be limited to a woman for her jointure. In the caſe of a limitation in fee, I conceive the jointreſs would have a full power of diſpoſing of it as ſhe pleaſed. But where an eſtate tail is limited to a woman for her jointure, ſhe is prohibited by the ſtatutes 11 *Hen.* 7. c. 20., and 32 *Hen.* 8. c. 36. ſ. 2., from alienating it, or creating a diſcontinuance of it by feoffment, fine, or recovery. Power of a Jointreſs over the Eſtate.

The caſes which have ariſen on theſe ſtatutes, will be ſtated under Title 36. Recovery.

§ 34. Where lands are limited to a woman for life for her jointure, ſhe has the ſame rights, with reſpect to eſtovers and emblements, and is under the ſame reſtrictions reſpecting waſte, unleſs there is a deficiency in her jointure, as other tenants for life. Baſſett v. Baſſett, Finch, 189. Cook v. Winford, 1 Ab. Eq. 221.

§ 35. A jointreſs is not entitled to the crops ſown at the time of her huſband's death; becauſe a jointure is not a continuance of the eſtate of the huſband like dower.

§ 36. As to emblements, it has been held, that although a dowreſs ſhall have emblements, becauſe dower is conſidered as a continuance of the eſtate of the huſ- Fiſher v. Forbes, 9 Vin. Ab. 374.

band, yet a jointure is not; and, therefore, the repreſentatives of a jointreſs are not entitled to them.

A Rent-charge is now uſually limited as a Jointure.

§ 37. The inconveniencies which attend a limitation of land by way of jointure are ſo numerous, that it has long been a general practice to limit or grant a rent charge to the intended wife for her life, to commence from the death of her huſband; with powers of diſtreſs and entry, and a term of years for ſecuring the payment of it; which has been found by experience to be much more convenient, both to the jointreſs and to the heir: as a more certain income is thereby ſecured to the jointreſs, and the heir continues in the poſſeſſion and management of the whole eſtate.

A Jointure not forfeited by Attainder of the Huſband. 1 Inſt. 37 *a*.

§ 38. A jointure is, in ſome caſes, more favoured in law than dower; for, although the huſband be attainted of treaſon, yet the wife will be entitled to claim her jointure.

Nor by Elopement of the Wife. 3 P. Wms. 269.

§ 39. Nor does the wife forfeit her jointure by elopement with an adulterer, although we have ſeen that dower would be forfeited in ſuch a caſe.

Who may take a Jointure.

§ 40. As a jointure is an eſtate limited to a woman in lieu and ſatisfaction of dower, it follows, that all thoſe who are capable of being endowed, are alſo capable of taking a jointure.

An Infant is bound by a Jointure.

§ 41. It was formerly much doubted, whether a jointure ſettled on an infant before marriage, was a bar to dower. But it has been determined by the Houſe

Houſe of Lords, that where a jointure is limited to an infant before marriage, ſhe cannot waive it after her huſband's death, and claim dower.

§ 42. Sir *Thomas Drury*, previous to his marriage with *Martha Tyrrell*, who was then an infant, by indenture made between the ſaid Sir *Thomas Drury* of the firſt part, the ſaid *Martha Tyrrell* of the ſecond part, and two truſtees of the third part, agreed that the ſaid *Martha Tyrrell*, in caſe the marriage took place, and ſhe ſurvived her intended huſband, ſhould have and enjoy an annuity of 600 *l.* during her life, for and in the name of her jointure; and that the ſame ſhould be accepted and taken by her in full ſatisfaction and bar of her dower: and Sir *Thomas Drury* covenanted with the truſtees to pay the ſaid annuity of 600 *l.* This deed was executed by Sir *Thomas Drury* and Miſs *Tyrrell*, in the preſence of her guardian, who was a ſubſcribing witneſs to it; and the marriage was ſoon after ſolemnized, with the privity and conſent of the guardian. Miſs *Tyrrell* was only entitled to a portion of 2,000 *l.*

Earl of Bucks v. Drury, 3 Bro. Parl. Ca. 492.

Sir *Thomas Drury* died inteſtate, being ſeiſed in fee of a conſiderable real eſtate, leaving two daughters. Lady *Drury*, upon the death of her huſband, inſiſted, that as ſhe was an infant at the time of executing the aforeſaid indenture, and at the time of the ſolemnization of her marriage, ſhe was not bound to accept of the proviſion thereby made for her, but was entitled to dower. The two daughters of Sir *Thomas Drury*

filed a bill in Chancery againſt Lady *Drury*, praying that ſhe might be reſtrained from claiming dower.

The cauſe was heard before Lord Chancellor *Henley*, who decreed, that Lady *Drury* was entitled to dower.

On an appeal to the Houſe of Lords, it was contended by the appellants, that, by the ſtatute 27 *Hen.* 8., no woman having a jointure ſettled on her before marriage, ſhould claim or have title to dower; ſo that, in all caſes where jointures are made, the ſubſequent marriage, which at common law gave a title to dower, after this act, gave no ſuch title, and the jointure is made a ſtatutable proviſion for her, in lieu of the proviſion at the common law. It does not, therefore, depend on the conſent of the wife, that the jointure takes away the right of dower, but, having the jointure, ſhe never gains any title to dower. That this act gives no colour to the conſtructive exception of infants inſiſted on by the reſpondent. The words are general: "*Every woman married, having jointure made, ſhall not claim, nor have title to any dower.*" This includes infants, as well as adults; and, if the Parliament had meant to diſtinguiſh between the two caſes, it would have been neceſſary to except infants, in expreſs terms, and not to have left it to conſtruction only; for at the time of making this law, there muſt have been numerous inſtances of jointured infants; and the ſingle caſe, in which it was probable that the wife might be injured by the influence and power of her huſband, to bar

bar her of dower by a jointure, was that of a jointure after marriage; which caſe is expreſsly provided for by the act, that the wife, after the death of her huſband, may elect between the two rights. But if infants were not bound by their jointures, no eſpecial proviſion being inſerted in the ſtatute, to compel them to an election, when the huſband was ſeiſed of the legal eſtate in the land, they would take not only their dower, but their jointure alſo, which is contrary to the whole ſpirit of the act. It was never meant that any woman ſhould have jointure and dower both. If infants had been excepted, that exception would have been to their diſadvantage, by preventing their marriage. At that time, moſt ladies of fortune, particularly landed fortunes, were married before they were of age, by reaſon of the advantage which accrued from their marriage to the lords under whom the tenure was derived; and, in fact, women are moſt frequently married under age. But if they could not bar themſelves, during their infancy, from claiming dower, by accepting jointures, ſuch marriages could not prudently be had in families of wealth and rank. Dower, though a juſt and honourable proviſion for the wife, is a right inconvenient to the heir, preventive of the free uſe and improvement of his lands, and, in great eſtates, a far more ample proviſion than can be in reaſon demanded or expected. The legiſlature, therefore, intended, that all women capable of contracting marriage, ſhould be bound by jointures made before marriage, which are preſumed to be ſettled by the advice of parents, guardians, and friends; or, if made only with their own conſent, by the huſband fairly without fraud:

ſtill it was thought reaſonable, that ſhe, whom the law allowed to bind herſelf by the marriage, which is the principal contract, ſhould be bound by a proviſion which is acceſſary to that contract, and a condition of it: that, according to this conſtruction, the opinion of the lawyers had been uniform, that a jointure made before marriage upon an infant, is a bar of dower; and, on this preſumption, ſettlements had been made upon infants in many families of this kingdom. In the various inſtances of jointures made before marriage upon infants, none could be found, either in authority or experience, where it has been adjudged, or inſiſted, or yielded in fact, that a widow might waive a jointure before marriage, on account of infancy, and claim her dower. That the long unvaried practice of the Court of Chancery gives a full ſanction to this conſtruction of the ſtatute, by directing, on every application for the marriage of an infant female ward of the court, that a maſter ſhould ſee a proper ſettlement made on ſuch infant by way of jointure; whence, it may be preſumed, that the court always underſtood that ſuch ſettlement and jointure would be effectual and binding in law on both the parties; intending, at the ſame time, to lend its aid and judgment to the infant ward, as her beſt guardian and protector.

On the other ſide, it was contended, that, before the ſtatute 27 *Hen.* 8. c. 10., no jointure made on a woman, though of the age of 21 years, was binding or concluſive on her, but ſhe might waive ſuch jointure, and claim title to a third part of the real eſtate which her huſband was ſeiſed of or entitled to, in fee, or in

tail, at the time of her marriage, and at any time during the coverture; but, ſince that act, a jointure made upon a woman of full age, previous to her marriage, is concluſive upon her, in caſe ſuch jointure be made of lands and tenements to take effect in poſſeſſion or profit preſently after the deceaſe of her huſband, and be for the term of her own life, or a greater eſtate; or otherwiſe ſhe has it in her election to take the jointure or dower; and ſo, likewiſe, if the jointure is made after marriage. That it was not to be conceived to have been the intention of this act, that a jointure made before marriage on a woman under age, ſhould be binding and concluſive on her; as the law was then, and has ever ſince, continued to be clear and undoubted, that no conveyance or acceptance of any real eſtate, whether by or under a fine, recovery, or other deed could, or now can, bind an infant, either male or female; and if the Legiſlature had intended, that an infant female ſhould be bound by ſuch a jointure made upon her before marriage, care would have been taken, that ſo remarkable an alteration of the known law of the land ſhould be clearly ſo expreſſed, eſpecially as it muſt be agreed, that this act is not binding on the huſband of an infant making ſuch jointure, but is abſolutely void, and, when he comes of age, he may totally diſavow the ſame. And there ſeems to be as much reaſon to ſuppoſe that the makers of this act intended, if any infants were to be bound at all, that both males and females ſhould be equally ſo; and the Legiſlature would probably have made ſome proviſion, that jointures, made by or upon infants, ſhould have been executed with ſuch ſolemnities, and under ſuch

guards and cautions, as might have effectually prevented any fraud or impoſition, or been otherwiſe injurious to infants executing the ſame. That, if the doctrine of a female being in all events bound by that ſtatute, though an infant of the age of 12 years perhaps, ſhould once clearly be eſtabliſhed, it might give occaſion to the practice of great frauds, and be productive of the greateſt miſchiefs and inconveniencies; for, in ſuch a caſe, a man of a great real eſtate might engage an infant of 12 years old to marry him, and, by his ſettling of any ſmall part of his real eſtate on her, by way of jointure, might bar her out of his eſtate, at the ſame time that he, in right of ſuch marriage, acquired an abſolute property in all her perſonal eſtate.

After hearing counſel on this appeal, the following queſtion was put to the judges: "Whether a woman "married under the age of 21 years, having before "ſuch marriage a jointure made to her, in bar of her "dower, is thereby bound, and barred of dower within "the ſtatute 27 *Hen.* 8. c. 10.?"

Vide Sir E. Wilmot's Notes, 177.

Mr. Baron *Gould*, Lord Chief Baron *Parker*, and Lord Chief Juſtice *Pratt*, delivered their opinions in the negative. But the reſt of the judges, namely, Mr. Juſtice *Wilmot*, Mr. Juſtice *Bathurſt*, Mr. Baron *Adams*, and Mr. Baron *Smythe*, delivered their opinions in the affirmative. Lord *Hardwicke* and Lord *Mansfield* alſo delivered their opinions in the affirmative, whereupon the decree was reverſed.

§ 43. The

§ 43. The principle upon which this caſe was determined, is, that a jointure being *a proviſione viri*, and not *ex contractu*, the conſent of the intended wife is not a circumſtance required by the ſtatute 27 *Hen.* 8., to render a jointure ſettled on her before marriage a bar to dower; and Lord *Mansfield*, in delivering his opinion in the Houſe of Lords on this caſe, ſaid, that a jointure was not a *contract* for a proviſion, but a proviſion made by the huſband, &c. as defined by Lord *Coke*; and ſo, the conſequences drawn from an infant's incapacity of contracting, were ill founded. It is therefore now held, that the intended wife need not be a party to the deed by which the jointure is limited: and, in an opinion of the late Mr. *Fearne*, he ſays, "I diſcover nothing in the ſtatute 27 *Hen.* 8. of join-"tures that requires the wife being a party to the deed "which ſecures her jointure; and ſome of the caſes "ſaid to be within that ſtatute, ſeem rather againſt "ſuch a concluſion."

4 Bro. Rep. 506. note.

Jordan v. Savage, Ante.

§ 44. It is, however, neceſſary, I conceive, that the intended wife or her guardians, where ſhe is under age, ſhould have notice of the jointure limited to her; otherwiſe ſhe may be defrauded by the ſettlement of a jointure inadequate to her rank or fortune. In which caſe, there can be no doubt but that ſhe would be relieved in equity.

TITLE VII.

JOINTURE.

CHAP. II.

In what Caſes a Jointreſs is entitled to the Aid of a Court of Equity.

§ 1. *A Jointreſs is protected in Equity.*
6. *Although ſhe elopes from her Huſband.*
9. *Relieved againſt a prior voluntary Conveyance.*
10. *And againſt a Term for Years.*
11. *Effect of a Covenant that Lands are of a certain Value.*
§ 15. *Neglect in a married Woman will not bar her.*
18. *Waſte allowed to make up a Deficiency.*
19. *Where Intereſt is allowed for Arrears.*
20. *Jointreſs not bound to deliver up Title Deeds.*

Section 1.

A Jointreſs is protected in Equity.

A JOINTRESS is conſidered in equity as a purchaſer for a valuable conſideration, marriage alone being deemed in law a valuable conſideration; and, therefore, a jointreſs is entitled to the protection and aid of a court of equity: ſo that, whenever there appears to have been an agreement to ſettle a jointure, a ſpecific execution of ſuch agreement will be decreed by the Court of Chancery.

Hayner v. Hayner, 1 Vent. 343.

§ 2. A man agreed, by articles, to ſettle certain lands on his intended wife, for her jointure, before the ſolemnization

ſolemnization of the marriage. The marriage took effect, but the huſband died before any ſettlement was made, and the wife brought her bill for an execution of the articles.

It was contended, that as the agreement was, to make a ſettlement *before* marriage, and as the plaintiff married without requiring ſuch ſettlement, it amounted to a waiver of the articles, and a releaſe in law; but an execution of them was decreed againſt the heir at law.

§ 3. Lord *Hardwicke* has ſaid, that in marriage contracts, where the fortune of the wife is paid to the father, or to clear incumbrances, or to the ſon, and the father and ſon are parties to the marriage contract, the wife has a lien both upon the eſtate of the father and ſon. 1 Atk. 440.

§ 4. Although a ſettlement ſhould be very unequal, and much in favour of the wife, yet the Court of Chancery will not relieve againſt it; becauſe it cannot put the wife into her former ſituation.

§ 5. Thus, where a remainder man brought a bill to be relieved againſt a jointure made by a tenant for life, in purſuance of a power, in conſideration of and previous to his marriage, being then upon his death bed; Lord Chancellor *Parker*, aſſiſted by Lord Chief Juſtice *Pratt* and the Maſter of the Rolls, denied relief. Wicherly v. Wicherly, cited 2 P. Wms. 619. Anon. 2 Cha. Ca. 17. Whitfield v. Taylor, Show. Parl. Ca. 20.

§ 6. Although

Although ſhe elopes from her Huſband.

§ 6. Although the wife ſhould have eloped from her huſband, and lived with another man in adultery; yet that circumſtance will not prevent a court of equity from decreeing a ſpecific execution of articles, by which a jointure was agreed to be ſettled on her.

Sidney v. Sidney, 3 P. Wms. 269.

§ 7. A woman brought a bill againſt her huſband for a ſpecific execution of her marriage articles, whereby he had agreed that a jointure ſhould be ſettled on her. The defendant ſet forth, that the plaintiff had withdrawn herſelf from her huſband, that ſhe had lived ſeparately, and very much miſbehaved herſelf. It was proved that the plaintiff did elope from her huſband, and went away with another man to a cottage about three miles from where her huſband lived; ſince which there had been no pretence of reconciliation; ſo that this was a bar of dower at common law, and equity ought not to aſſiſt ſuch a woman. Lord Chancellor *Talbot* obſerved, that the fact of adultery was not put in iſſue, the accuſation being only general and uncertain; but the articles being, that the huſband ſhould ſettle ſuch and ſuch lands in certainty upon his wife, for her jointure, this was pretty much in the nature of an actual and veſted jointure; as what is covenanted for a good conſideration to be done, is, in moſt reſpects, conſidered in equity as actually done; conſequently, this was a jointure, and not forfeitable either for adultery or elopement. The reaſon why a wife forfeits her dower by an elopement with an adulterer, and yet the huſband does not, by leaving his wife and living with another woman, forfeit his eſtate by the curteſy

curteſy is, becauſe the ſtatute *Weſtm.* 2. does, by expreſs words, create a forfeiture in the one caſe, and not in the other.

Decreed, that the huſband ſhould perform the articles.

§ 8. Where a bill was filed, praying a performance of marriage articles, the huſband reſiſted ſo far as the articles made a proviſion for the wife, alledging and proving that ſhe lived ſeparate from him, in adultery. The court was of opinion, that this was not a reaſon for non-performance of the articles, and decreed accordingly.

Blount v. Winter, 2 P. Wms. 377. n.

§ 9. A jointreſs will be relieved in Chancery againſt a prior voluntary conveyance; becauſe marriage is a ſufficient conſideration to make a wife a purchaſer; and all voluntary conveyances are *prima facie* to be looked on as fraudulent againſt purchaſers, unleſs the contrary appear.

Relieved againſt a prior voluntary Conveyance.

Douglas v. Waad, 1 Cha. Ca. 99. Martin v. Seamore, 1 Cha. Ca. 176. 10 Mod. 469.

§ 10. The Court of Chancery will alſo ſet aſide a term for years in favour of a jointreſs; though it will not do ſo in favour of a woman entitled at law to dower; becauſe a jointreſs has a fixed intereſt by the agreement of the party.

And againſt a Term for Years.

Prec. in Cha. 65. Interest

§ 11. If a huſband covenants that the lands limited in jointure are of a certain yearly value, and they prove afterwards deficient, the covenant will be decreed to

Effect of a Covenant that the Lands are of a certain Value.

Speake v. Speake, 1 Vern. 217.

be performed in ſpecie; and although ſuch a covenant be only inſerted in articles, and not in the ſettlement made purſuant to them, yet the covenant ſubſiſts in equity.

Hedges v. Everard, 1 Ab. Eq. 18.

§ 12. A jointreſs brought her bill to have an account of the real and perſonal eſtate of her late huſband, and to have ſatisfaction for a defect of value of her jointure lands, which he had covenanted to be, and to continue, of a certain yearly value. The defendant inſiſted that this was a covenant which founded only in damages, and was therefore properly determinable at law. But though it was admitted that a court of equity cannot regularly aſſeſs damages, yet it was determined that, in this caſe, a maſter might properly enquire into the amount of the defect, and report it to the court, which might ſend it to be tried at law upon a *quantum damnificat.*

Parker v. Harvey, 2 Ab. Eq. 241. 4 Bro. Parl. Ca. 604. Euſtace v. Keightly, 4 Bro. Parl. Ca. 588.

§ 13. Where lands, ſettled on a woman for her jointure, are covenanted to be of a certain clear yearly value, and after the death of the huſband they prove deficient, the jointreſs is entitled to have the deficiency made good out of the other lands; and to come in as a ſpecialty creditor upon the huſband's eſtate, for the arrears of the deficiency, with intereſt.

Glegg v. Glegg, 2 Ab. Eq. 27. 4 Bro. Parl. Ca. 614.

§ 14. Where, in marriage articles, the lands agreed to be limited in jointure are expreſſed, but not covenanted, to be of a certain yearly value, and afterwards prove deficient, this amounts to an agreement that they were of

of that value, and is a ſufficient foundation for making up the deficiency.

§ 15. The neglect of a married woman, during the coverture, will not prevent the Court of Chancery from aſſiſting her, in caſe her jointure proves deficient.

Neglect in a married Woman will not bar her.

§ 16. A perſon made a ſettlement on his eldeſt ſon for life, with remainder to his firſt and other ſons in tail, remainder over; with power for his ſon to appoint any of the lands, not exceeding 100 *l. per annum*, to any wife he ſhould afterwards marry, for a jointure, (the father being under an apprehenſion that he was then married to a woman which the father diſliked, and had no intention that his ſon ſhould provide for). The father died, and the ſon married that woman, (though there was a ſtrong preſumptive proof that he was married to her before); and, after marriage, appointed certain lands to truſtees, in truſt for her, for a jointure; and covenants, that if they were not of 100 *l. per annum* value, that, upon requeſt made to him any time during his life, he would make them up ſo much out of the other lands in his power. He lived ſeveral years, and no complaint was made that the lands were not of that value, nor requeſt to make it up; and died without iſſue. On a bill brought by the widow to have the jointure made up 100 *l.* the Lord Keeper ſaid, that a proviſion for a wife or for children was not to be conſidered as a voluntary covenant; and therefore decreed the deficiency to be made up, notwithſtanding

Fothergill v. Fothergill, 1 Ab. Eq. 222.

ſtanding the circumſtances of the caſe, and her neglect in not requeſting it during the coverture, for the laches of a feme covert cannot be imputed to her.

Beard v. Nuthall, 1 Vern. 427. 1 Ab. Eq. 221.

§ 17. If a perſon gives a voluntary bond, after marriage, to make a jointure to his wife, and he makes a jointure accordingly, and the wife gives up the bond; if the jointure is evicted, it ſhall be made good out of the perſonal eſtate of the huſband, there being creditors; for the delivery up of a bond by a feme covert, can no way hurt her.

Waſte allowed to make up a Deficiency.

Carew v. Carew, 1 Ab. Eq. 221.

§ 18. Where this is a covenant that a jointure ſhall be of a certain yearly value, though the eſtate be not limited without impeachment of waſte; yet the jointreſs may commit waſte, ſo far as to make up the defect of the jointure; and the Court of Chancery will not prohibit.

Where Intereſt is allowed for Arrears.

Anon. 2 Veſ. R. 261.

§ 19. Intereſt is not in general allowed for arrears of a jointure; but the court will expect a ſpecial caſe to be made for that purpoſe; as the being obliged to borrow money, and pay intereſt for it; and then the court will give intereſt from a reaſonable time.

A Jointreſs is not bound to deliver up Title Deeds.

Towers v. Davys, 1 Vern. 479.

§ 20. If a bill is brought by an heir at law, or any other perſon, againſt a jointreſs, whereby the party would avoid the jointure, under pretence that his anceſtor had not a ſufficient title to make ſuch a jointure, and ſeeks for a diſcovery of deeds and writings, whereby

whereby he would avoid the title of the jointreſs; he will not be allowed to have ſuch a diſcovery, though the jointure be made after marriage, unleſs he, by his bill, ſubmits to comfirm her title; and then he ſhall.

Select Ca. in Cha. Temp. King, Limax v.

§ 21. A widow is not obliged in equity to diſcover the deed under which ſhe claims the jointure, on the bare offer of confirming it; but it muſt be abſolutely confirmed.

Luck v. Trollop, 2 Veſ. 662.

TITLE VII.

JOINTURE.

CHAP. III.

What will operate as a Bar or Satisfaction of a Jointure.

§ 1. *The Husband cannot defeat a Jointure.*
2. *Unless the Wife joins him in a Fine or Recovery.*
§ 4. *A Devise is no Bar to a Jointure.*
10. *But is sometimes considered as a Satisfaction.*
15. *Elopement is no Bar.*

Section 1.

The Husband cannot defeat a Jointure.

WHERE a jointure is settled on a woman before marriage, pursuant to the statute 27 *Hen.* 8. c. 10., it so far resembles dower, that it cannot be defeated by the alienation of the husband alone; or be charged with any incumbrances created by him after the marriage.

Unless the Wife joins him in a Fine or Recovery.

Vide Tit. 35, 36.

§ 2. But if the wife joins with her husband in levying a fine, or suffering a common recovery of the lands settled on her as a jointure, or out of which the jointure is to issue, she will be thereby barred; upon the same principle that a fine or recovery in which she joins her husband, bars her from claiming dower.

§ 3. If

§ 3. If the jointure, whereof the wife joins in a fine or recovery, was made before marriage, the wife is then barred, not only of the jointure, but alſo of her claim to dower; whereas, if the jointure be made after marriage, a fine or recovery by the huſband and wife of ſuch jointure, will not bar the wife of her right to dower. For, in the firſt caſe, the jointure being made before marriage, was not waivable; whereas, in the ſecond caſe, her eſtate was originally waivable, and the time of her election came not until after the deceaſe of her huſband, ſo that ſhe may claim her dower in the reſidue of his lands.

1 Inſt. 37 *a*. Dyer, 358 *b*.

§ 4. The principles laid down in the preceding title, reſpecting the effect of deviſes, have been adopted in the caſe of jointures; ſo that a deviſe of other lands or of perſonal property, by a huſband to his wife, will not operate as a bar or ſatisfaction of a jointure, ſettled upon her either before or after the marriage, unleſs it appears plainly from the will that the teſtator made thoſe bequeſts, in lieu and ſatisfaction of the jointure.

A Deviſe is no Bar to a Jointure.

§ 5. *H.* being ſeiſed in tail of ſome lands, with remainder over, and alſo ſeiſed for life of other lands, with a power to make a jointure in bar of dower, with remainder over, *&c.*: during his minority, in conſideration of a marriage to be had with the daughter of *U.* and 1000 *l.* paid down, and 3000 *l.* more to be paid by *U.* to *H.* at his age of twenty-one, did covenant, by his guardian, to ſettle a jointure of 500 *l. per annum*, when he came of age, upon his intended wife. The

Hooke v. Grove, 5 Vin. Ab. 293. Pl. 40. 2 Ab. Eq. 218. 389. 4 Bro. Parl. Ca. 593.

marriage took effect; and afterwards *U.*, the plaintiff's father, pays *H.* the 3000 *l.* reſidue of the portion, when he came of full age; and then *H.*, in purſuance of the covenant entered into by his guardian, doth ſettle a jointure of 500 *l. per annum* upon his wife the plaintiff. Some years after, *H.* makes his wife an additional jointure of 250 *l. per annum*, upon her father's dying and leaving her the value of 9000 *l.*; and, at the ſame time, perſuades his wife to join with him in a fine of all the reſidue of his eſtate. Afterwards *H.* dies, and by his will deviſes a houſe and lands to his wife for her life, to the value of 270 *l.*, and gives her a legacy of 4000 *l.*, and his plate and jewels to the value of 2000 *l.* more, and makes her executrix, and gives her the moiety of the reſidue of his perſonal eſtate, *&c.* It happened that the jointure, made purſuant to the marriage articles, proved defective, both in title and value, and thereupon ſhe brought a bill againſt the remainder man, to have a ſatisfaction out of the real eſtate for the deficiency of her jointure, *&c.*

There were two principal points in this caſe:—1ſt, If the additional jointure, being a voluntary ſettlement after marriage, ſhould go in ſatisfaction *pro tanto* of the jointure made purſuant to the marriage articles.

2dly, If the 270 *l. per annum*, deviſed to her for life, ſhould go in ſatisfaction of the marriage articles, or if the legacies left her by the will ſhould be deemed a full ſatisfaction.

Lord

Lord *Harcourt* Ch. was of opinion, that the additional jointure of 250 *l. per annum* ſhould not go in part ſatisfaction of the marriage agreement, which, though made by the guardian, did bind *H.* as ſtrongly as if he had been of full age, and had ſigned the articles himſelf; eſpecially ſince *H.*, at his full age, did receive the 3000 *l.* reſidue of his wife's portion; and did actually make a jointure of 500 *l. per annum* to his wife, in purſuance of thoſe articles. Now, when he had ſettled the additional jointure of 250 *l. per annum* on his wife, he could not intend it in ſatisfaction *pro tanto* of 500 *l. per annum*; becauſe, before that time, he had made her a jointure of 500 *l. per annum*, purſuant to the marriage articles, which he then thought to be a good ſettlement; and, therefore, there was no room left for the preſumption in equity, that a voluntary ſettlement ſhould be intended in ſatisfaction of a precedent covenant or agreement, though not made in purſuance of it; and ſo as to the deviſe of 270 *l. per annum* for her life, and the 4000 *l.* legacy, *&c.* they could not be intended by *H.* in ſatisfaction of the jointure by the marriage articles, but given to her as a bounty by her huſband; becauſe, at that time, he thought his wife's jointure was well ſettled and ſecured: beſides, money or perſonal eſtate ſhall never be deemed in equity a ſatisfaction for a freehold.

And decreed, that the remainder man ſhould ſettle 500 *l. per annum* upon the plaintiff for life out of the lands which came to him upon the death of *H.*: and that the lands contained in the additional jointure, or deviſed to the plaintiff, ſhould not come in aid of the other lands *pro rata* to make a ſatisfaction for the marriage

articles; but the whole 500 *l. per annum* ſhould entirely come out of the other lands in remainder, notwithſtanding the fine levied by *H.* and his wife the now plaintiff of thoſe lands, though that be a bar and eſtoppel of her dower at common law: and that the plaintiff have a ſatisfaction for the ſaid 500 *l. per annum* from the time of the death of her huſband *H.* And his Lordſhip did alſo direct the defendant to account for the rents and profits of the additional jointure of 250 *l. per annum* from the death of *H.* But the counſel for the defendant moved, that the additional jointure was made out of the lands of which *H.* was only tenant for life, with power to make a jointure, *&c.*; and that the power was not well executed at law; and being a voluntary ſettlement, if the power was not well executed, it ought not to be aided in equity. To which Lord Ch. ſaid, he ſaw no reaſon why a defective execution of a power for the benefit of the wife, though otherwiſe provided for, ſhould not be aided in a court of equity, as well as want of a ſurrender of a copyhold in caſe of a deviſe to a child, who hath another proviſion by the will; but ſince it was inſiſted on that there was no precedent in this court of ſupplying a defective execution of a power in caſe of a voluntary ſettlement, he gave leave to try the validity of the execution of this power at common law, and retained the bill, *quoad* that part, until it was determined at law. On an appeal to the Houſe of Lords, the decree was affirmed.

Eaſtwood v. Vincke, 2 P. Wms. 613.

§ 6. A man, on the marriage of his wife, gave a bond to a truſtee in the penalty of 4000 *l.*, conditioned

ditioned that if he, at any time within four months, ſhould ſettle and aſſure freehold lands of the yearly value of 100 *l.*, then the bond to be void. The huſband, ſoon after the marriage, made his will, deviſing thereby freehold and copyhold lands, lying intermixed in *Norfolk*, to his loving wife and her heirs, and died within four months after the marriage.

Maſter of the Rolls.—" As money and lands are " things of a different nature, the one ſhall not be taken " in ſatisfaction of the other; whatever is given by a will " is *prima facie* to be intended a bounty and benevo- " lence; and it is remarkable that, in the preſent caſe, " the deviſe is to his *loving wife*, which is a term of " affection. The deviſe of ſuch of the land as is copy- " hold, cannot poſſibly be towards ſatisfaction of the " 100 *l. per annum*, which was to be freehold: nay, " ſuppoſing the whole 88 *l. per annum* were freehold, " it would not go towards ſatisfaction of the 100 *l. per* " *annum*, not being ſo expreſſed. And ſuppoſing " there are aſſets to pay all the bond debts, and like- " wiſe the charges laid by the will on the land, in ſuch " caſe, the 88 *l. per annum* ſhall be enjoyed as a bounty " and benevolence."

This decree was, on appeal *Paſch.* 1732, affirmed by the Lord Chancellor,

§ 7. A father and ſon, upon the marriage of the ſon, covenanted that the lands ſettled on the ſon's wife for her jointure were worth 300 *l. per annum.* The ſon gave by his will a legacy of 1000 *l.* to his wife,

Probert v. Morgan and Clifford, 1 Atk. 440.

On a bill brought by the wife to have a deficiency in her jointure ſupplied out of the aſſets of her huſband and his father, and alſo for the legacy of 1000 *l.*

Lord *Hardwicke* held, that the legacy of 1000 *l.* given by the will to the wife, ought not to be conſidered in this caſe, as a ſatisfaction for the deficiency of her jointure, becauſe that did not ariſe till after his death, and therefore could not, at that time, be in his conſideration. And as the jointure lands were covenanted by the marriage-ſettlement to be worth ſo much, clear of all reprizes, the teſtator plainly intended the 1000 *l.* as a bounty for her.

Prime v. Stebbing, 2 Veſ. 409.

§ 8. *John Sheppard* having, by his marriage-articles, covenanted, that the lands ſettled on his wife were of the annual value of 1600 *l.* above all incumbrances, made his will in this manner: "I do hereby ratify "and confirm my marriage-articles; and I do alſo "give to my wife the lands in *A*, *B*. for life." The wife and her ſecond huſband brought a bill to have a deficiency in her jointure lands ſupplied, which was not diſputed; but it was inſiſted, that the lands deviſed ſhould be taken inſtead thereof.

Lord *Hardwicke*—If a huſband, upon his marriage, in conſideration of a diſparity of years, or any other perſonal conſideration, will make a very large ſettlement, the parties claiming under it, whether wife or children, are entitled to have it carried into execution, according to the intent. The defendants do not diſpute but that, notwithſtanding the largeneſs of this ſettlement,

ſettlement, the plaintiffs are entitled to have any deficiency of jointure, on the foot of the covenant ſupplied and made good; but inſiſt, that the court ought to conſider, and, according to the rules eſtabliſhed, to allow the lands deviſed, to be either a ſatisfaction or performance, or, at leaſt, a part performance of this contract; and to go, ſo far as they may, in point of value, to make up the deficiency. If the court can in any caſe do that, they ought in this; but I am of opinion, that, if allowed in this caſe, I ſhould make a precedent not agreeable to the rules eſtabliſhed, and which might be of ill conſequence and inconvenience in other caſes. The ſame rule of juſtice, therefore, muſt prevail in this, as in others. The huſband was bound by his contract to make the jointure then ſettled to the value of 1600 *l. per annum*: this was, therefore, what ſhe had a right to as a purchaſer; and whatever aroſe from thence was her own eſtate, which ſhe was entitled to, as a debt from her huſband to her. Then to conſider what he has done by his will. In the very firſt clauſe, he ſeems anxious for, and to take care of her; therefore, it cannot be imagined that he intended to prejudice her. The huſband's covenant, that theſe lands are of ſuch an annual value, does amount to a covenant on his part to ſettle and make good to that extent, in caſe of deficiency, for ſhe might have damages; therefore, it has been argued, that, when the huſband by his will has given lands of the ſame, or in part, of the value, that is ſo far a performance of his covenant; for that he has by that act ſo far made it up. It is compared to caſes where a huſband covenants to ſettle on the eldeſt ſon

of

of the marriage, and lets land deſcend to him in fee; which is a performance ſo far; and where huſband covenants and dies inteſtate, which was held a leaving to his wife ſo much, becauſe, whether left by will or to go by the rules of law, it was the ſame, and a performance, and, indeed, a ſtrict performance. So, where lands deſcended to an heir at law, who claimed, in place of his anceſtor, a ſum of money to be laid out in land. But I am of opinion, that this differs from all the caſes that have been of that kind. It has been conſidered, whether this is to be taken as a queſtion of ſatisfaction or of performance, and, poſſibly, it may be more properly conſidered as a queſtion of performance, or part performance; but, in my opinion, this is not ſtrictly any of thoſe caſes. It is a queſtion of conſtruction of a will, and intent of the huſband therein: all the above mentioned caſes have been of implied ſatisfaction or preſumed performance, where the huſband or father has done nothing, as, in the ſuffering lands to deſcend without any declaration what way he intended they ſhould go. The court was there to conſider from circumſtances, whether there was ground to imply or infer a part performance, the perſon having ſaid nothing; but here is a will made; and therefore the queſtion is upon the conſtruction of that will, and the intent to be put upon that conſtruction; and he could not intend to give theſe lands thereby as a ſatisfaction, for what ſhe was, in ſtrictneſs of law, entitled to under the articles, but clearly as an accumulated bounty, over and above. It is the ſame as if he had repeated every iota in theſe articles, and ſaid, I alſo give her ſuch lands. An inquiry, therefore, muſt be directed, of the deficiency

of

of the jointure; and whatever it is, muſt be made good out of the eſtate of *John Sheppard.*

§ 9. Sir *B. Broughton*, by articles previous to, and in conſideration of his marriage with *Mary Hill*, covenanted, that, in conſideration of the ſaid marriage, and of 10,000 *l.* her marriage portion, he would convey certain lands in the county of *Cheſter* to truſtees, to ſecure an annuity of 1000 *l.* to the ſaid *Mary Hill* for her jointure, and in bar of dower, remainder to his firſt and other ſons in tail; remainder to his own right heirs. The marriage took effect, and Sir *Bryan Broughton* received the 10,000 *l.* portion; but no ſettlement was ever executed purſuant to the articles. Sir *Bryan Broughton* having ſold a large eſtate in *Lincolnſhire* for 27,000 *l.*, and having contracted for the purchaſe of ſeveral conſiderable eſtates in the county of *Southampton*, deviſed to Lady *Broughton* a leaſehold houſe in which he reſided, with all the furniture thereof, and alſo deviſed to her and her heirs, all the eſtates in the county of *Southampton*, for the purchaſe whereof he had then contracted, or, in lieu thereof, the whole money ariſing from the ſale of his eſtates in *Lincolnſhire.* He then deviſed his lands in *Cheſter*, which were liable to the jointure, to truſtees, to the intent that *Charles Shrimpton* ſhould receive thereout an annuity of 20 *l.*, and ſubject thereto to the uſe of his heir at law for life, remainder to his firſt and other ſons in tail male; remainder over. After the teſtator's death, his wife entered on the eſtates deviſed to her by her huſband's will, and the heir at law having refuſed to pay her jointure, ſhe filed a bill, praying a ſpecific execution of the mar-

Broughton v. Errington, 7 Bro. Parl. Ca. 461.

riage articles, ſo far as related to her jointure: to which, the heir at law put in his anſwer, inſiſting, that what was given by the will to Lady *Broughton*, was a ſatisfaction for what ſhe was entitled to under the articles, or that ſhe could not have both proviſions. Iſſue being joined, the cauſe was heard before Lord Chancellor *Bathurſt*, who decreed, that Lady *Broughton* was entitled to have her jointure agreeable to the articles. From this decree, an appeal was brought in the Houſe of Lords; and, on behalf of the appellants, it was argued, that though a deviſe, when conſidered by itſelf, may carry with it the preſumption of an intended bounty, yet, when a teſtator has covenanted by articles to make a proviſion for his wife and children, ſuch a preſumption is liable to be controlled by a ſtill ſtronger preſumption, that he intended the deviſe as a ſatisfaction for the performance of thoſe articles, and eſpecially, where the deviſe is ſo great in value as to include both a ſatisfaction and a bounty. This general preſumption, that where two proviſions are made for a wife or a child, the teſtator intended the one to be a ſatisfaction for the other, (which general preſumption is grounded on the known cuſtom of this realm, to give the bulk of the family eſtate to the eldeſt ſon or heir at law, with competent proviſions for the wife and younger children), was peculiarly ſtrong in the preſent caſe, where, from the heavy charges already laid on the family eſtate, the only brother and heir would be unable to maintain the ancient figure and credit of the family. That the lands alone, deviſed by the will, were of much greater value than the rent-charge claimed under the articles, and thereby all objections

were

were obviated which might have ariſen from the proviſion under the will not being of the ſame nature with that under the articles. That from the teſtator's having omitted any mention of the articles, although they muſt have been preſent to his memory while he was ſecuring another rent-charge of 20 *l.* a year to Mr. *Shrimpton*, and from the manner in which he deviſed thoſe eſtates to the appellant Sir *Thomas*, ſubject to that rent-charge, a ſtrong preſumption aroſe, that he conſidered the deviſe and bequeſts to his widow as an ample ſatisfaction for the articles. Laſtly, That the deviſe of the eſtate to Sir *Thomas* for life, was inconſiſtent with the claim of the rent-charge under the articles, inaſmuch as Sir *Thomas*, from the nature of his intereſt, was incapable of making any legal conveyance of the rent-charge ſo claimed.

On the other ſide, it was contended, that every deviſe or bequeſt in a will, *primâ facie*, imports a bounty; and, therefore, in order to induce a court of equity to conſider the bequeſts in this will in favour of the Lady as a ſatisfaction for her jointure of 1000 *l. per annum*, or as a performance of the marriage-articles entered into by Sir *Bryan*, it was incumbent on the appellants to ſhew, that it was the teſtator's intention when he made his will, to give her a ſatisfaction by that will for or in lieu of her jointure, or to perform the marriage-articles on his part. And ſuch intention muſt appear, either from the expreſs words of the will, or the clear and manifeſt intention of the teſtator appearing upon the face of it, or be drawn by neceſſary implication therefrom: but no ſuch intention appeared in any part of

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Sir *Bryan*'s will; rather the contrary. In order to make a deviſe or bequeſt a ſatisfaction for a collateral demand or performance of a prior contract, it muſt be *ejuſdem generis*, and not land for money, or money for land; or muſt at leaſt be of ſuch certain and known value and eſtimation, and ſo far of the ſame nature with the thing to be ſatisfied therewith, as to appear indiſputably to be equivalent or ſuperior, not only in groſs value, but in annual income, to the debt or demand or the thing to be performed; but none of theſe circumſtances attended the deviſes or bequeſts which, in the preſent caſe, were contended to be a ſatisfaction for the reſpondent *Mary*'s jointure, or a performance of Sir *Bryan*'s marriage articles. That the annuity of 1000 *l.* intended to be ſettled on her by thoſe articles, was intended to be a jointure for her, and declared to be in bar or ſatisfaction of dower; and therefore ought, in a court of equity as well as law, to be conſidered as coming in the place of dower, and having the ſame privileges, force, and effect as a right of dower; and neither courts of law or equity admit an averment of a collateral ſatisfaction for dower. That Sir *Bryan*, not having obtained any conveyance of the *Hampſhire* eſtates, or paid the purchaſe-money for them at the time of making his will, could not deviſe to the reſpondent *Mary* the legal intereſt therein; and, therefore, the deviſe to her was in fact a deviſe of the right to complete the purchaſe, and a gift of mere perſonal eſtate, or of ſo much money as he had agreed to give for the purchaſe of the *Hampſhire* eſtate, and appeared to be ſo conſidered by him from the penning of his will; but a bequeſt of perſonal eſtate cannot be averred to

be,

be, or conſidered as, a ſatisfaction for a jointure in lands, or a rent-charge upon a real eſtate. That, in in order to make Sir *Bryan*'s will a performance of his marriage articles, it muſt appear upon the face of it, and at all events, a complete and full performance thereof, and to have been ſo intended by him; but the very reverſe appeared; for the deviſe of the *Cheſhire* eſtate in his will muſt have been conſidered by him as ſubject to the articles, or ſpringing out of the ultimate remainder in fee reſerved to him by thoſe articles; and if he had had any ſon by his lady, ſuch ſon, as well as the mother, would have been entitled to call for a ſpecific performance of the articles; and the will could not be ſet up as a ſatisfaction thereof againſt the ſon, nor could ſuch ſon have inſiſted that the deviſes and bequeſts in the will to his mother were a performance of the articles, ſo far as related to her; nor, if a conveyance and ſettlement of the eſtate had been actually made and executed, purſuant to the articles, could any perſon, entitled under that ſettlement, have ſet up ſuch deviſes and bequeſts, to the reſpondent *Mary* in Sir *Bryan*'s will, as a diſcharge or ſatisfaction of her incumbrance or rent-charge upon his eſtate. That if Sir *Bryan* had intended to deviſe his *Cheſhire* eſtate to his brother, and the other deviſees in remainder, diſcharged from his lady's jointure, he would moſt probably have expreſsly declared ſuch intention by his will, as it appeared from many circumſtances, that, at the time of making this will, he had not forgot, but well remembered, that he had before ſettled ſuch a jointure on her; and his bequeathing her his houſe in *Brook Street*, and his plate, furniture, horſes, and carriages,

riages, proved his intention, that ſhe ſhould, after his death, live in a manner, and at an expence, ſuitable to her rank as his widow; and therefore, he muſt have intended by the deviſe in queſtion to increaſe her jointure, in order to anſwer that purpoſe.

After hearing counſel on this appeal, it was ordered and adjudged, that the ſame ſhould be diſmiſſed, and the decree complained of affirmed.

But is ſometimes conſidered as a ſatisfaction.

§ 10. But where it appears to have been the intention of the deviſor, that the thing deviſed ſhould be accepted as a ſatisfaction for a jointure, a court of equity will not permit the widow to take the thing deviſed, and alſo the jointure.

§ 11. Thus, if a jointure is agreed by articles to be ſettled on a woman, and the huſband, by his will, confirms ſuch jointure, and a conveyance of a leaſehold eſtate which he had ſettled on his wife, and declares them to be in full compenſation of her jointure, a court of equity will compel the widow to make her election.

Earl of Grandiſon v. Pitt, 2 Ab. Eq. 392.

§ 12. *Robert Pitt*, in conſideration of marriage, agreed to lay out 10,000 *l.* in land to ſeveral uſes, one of which was, to the uſe of the plaintiff *Harriet* for life, for her jointure. *Robert*'s father, after the marriage, gave him an eſtate for life, with power to grant a rent-charge of 400 *l. per annum* out of it to any woman for her jointure. *Robert*, in purſuance of the power, grants that rent to *Harriet* after his death, in ſatisfaction of part of her

her jointure. Three days after, he conveyed a leaſehold eſtate of 200 *l. per annum*, in truſt for his wife; and by his will, he confirmed the grant of the rent-charge, and the conveyance of the leaſehold ſettled on the plaintiff *Harriet*, by way of addition or augmentation, and in full compenſation of her jointure. It was held, that this was a ſatisfaction of the jointure provided by the articles, according to the intention of *Robert*; and that the lady ſhould make her election, whether to have the rent and leaſes, or the money laid out.

§ 13. Where there happens to be a deficiency in a jointure, which is covenanted to be of a certain yearly value, and the huſband deviſes lands to the jointreſs for life, and alſo a ſum of money, ſuch deviſes will be conſidered as a ſatisfaction for the defect of the jointure.

§ 14. *Francis* Lord *Montague*, on the marriage of *Prancis Browne* his eldeſt ſon with Mrs. *Molyneux*, ſettled ſeveral manors to the uſe of the lady for life, for her jointure: and the lands ſo ſettled, were covenanted to be of the yearly value of 1000 *l.* After the death of Lord *Montague*, the honour and eſtate came to the ſaid *Francis*, who deviſed other lands of about 500 *l. per annum* to his wife, for her life; together with a legacy of 1000 *l.*, and all his houſehold goods, not comprized in an inventory mentioned in his will. After the death of Lord *Montague*, his widow exhibited her bill in the Court of Chancery for a deficiency in her jointure, and to have it made good for the future.

Montague v. Maxwell, 2 Ab. Eq. 421. 4 Bro. Parl. Ca. 598.

Lord Chancellor *Cowper* declared, that the legacies given to Lady *Montague*, which were admitted to be of greater value than the defect of jointure, ought to be taken in ſatisfaction of her huſband's breach of covenant, in not ſettling lands in jointure of 1000 *l. per annum*. And this decree was affirmed by the Houſe of Lords.

Elopement is no Bar.

Ante, ch. 2.

§ 15. A jointure is not barred or forfeited by the elopement of the wife from her huſband and living in adultery with another man; and, it has been already ſtated, that theſe acts will not even preclude her from obtaining relief in equity.

TITLE

TITLE VIII.

ESTATE FOR YEARS.

CHAP. I.

Of the Origin and Nature of Eſtates for Years.

CHAP. II.

Of the Incidents to Eſtates for Years.

CHAP. I.

Of the Origin and Nature of Eſtates for Years.

§ 1. *Of Eſtates leſs than Freehold.*
2. *Origin of Eſtates for Years.*
6. *Definition of an Eſtate for Years.*
12. *A Tenant for Years has no Seiſin.*
17. *Eſtates for Years may commence in futuro.*
18. *And may be aſſigned before Entry.*
§ 21. *An Entry before the Leaſe begins is a Diſſeiſin.*
24. *A Term for Years is a Chattel.*
30. *Eſtates for Years muſt have a fixed Period.*
31. *May determine by Proviſo.*
32. *A Freehold cannot be derived from an Eſtate for Years.*

Section 1.

Of Eſtates leſs than Freehold.

HAVING explained the nature of the different freehold eſtates, I now come to treat of thoſe eſtates or intereſts in land, which are leſs than freehold. Of theſe, there are three ſorts: 1ſt, Eſtates for years: 2d, Eſtates at will: and, 3d, Eſtates at ſufferance.

 § 2. Under

Origin of Eſtates for Years.

§ 2. Under the *Saxon* government, and, for ſome centuries after the *Norman* conqueſt, the demeſne lands of the Thanes or lords were cultivated by perſons in a ſtate of abſolute ſervitude; and who were either annexed to a particular tract of land; in which caſe, they were called *Villeins Regardant*; or elſe annexed to the perſon of the lord, and transferrable by deed; in which caſe, they were called *Villeins in Groſs*.

§ 3. When either the religion or the liberality of the times, or ſome other motives, with which we are unacquainted, induced the lords to enfranchiſe their villeins, and to reſtore them to their natural liberty, they ſtill continued them in the employment of cultivating their eſtates, but did not give them any legal intereſt in their lands.

§ 4. It muſt, however, have been ſoon diſcovered, that ſo precarious a tenure as the will of the lord, operated as a ſtrong bar to the induſtry and exertions of the tenant; and therefore it became cuſtomary to grant the lands to ſuch tenants for a certain number of years; which was an intereſt ſufficiently certain to induce the tenant to improve them; and was yet infinitely inferior, in every reſpect, to an eſtate of freehold.

§ 5. Eſtates for years were become uſual in *Bracton's* time, as appears from the following paſſage: "*Poterit enim quis terram alicui concedere ad terminum annorum, et ille eandem infra terminum illum alteri dare.*" And a tenant for years was called *Firmarius*.

Bract. 27 *a.*

§ 6. "Tenant

§ 6. "Tenant for term of years, (ſays *Littleton*, "§ 58.), is where a man letteth lands or tenements to "another for term of certain years, after the number "of years that is accorded between the leſſor and the "leſſee, and the leſſee entereth by force of the leaſe, "then is he tenant for years." Definition of an Eſtate for Years.

§ 7. If a contract or agreement be made for the poſſeſſion of lands, but for half a year, or a quarter, or any leſs time, ſtill the leſſee is conſidered as tenant for years, and is ſo ſtyled in all legal proceedings; a year being the ſhorteſt period of which the law will in this caſe take notice. Lit. ſ. 67.

§ 8. Where an eſtate is limited to a perſon for 99 years, if *J. S.* ſhall ſo long live, it is an eſtate for years; for there is a fixed period beyond which it cannot laſt.

§ 9. It has been ſtated, that where a perſon deviſes lands to his executors for payment of his debts, and, until his debts are paid, they only take a chattel intereſt; and, therefore, they have an eſtate for as many years as are neceſſary to raiſe the ſum required. It is the ſame where an eſtate is deviſed until ſuch time as the ſum of 800 *l.* ſhall be raiſed out of the rents and profits thereof. Tit. 3. ſ. 8. Sir A. Corbet's caſe, 4 Rep. 81 *b.*

§ 10. Notwithſtanding the permanent intereſt thus given to tenants for years, yet their poſſeſſion was eſteemed of ſo little conſequence, that they were rather conſidered as the bailiffs or ſervants of the lord, Gilb. Ten 34.

than as having any eſtate in the land. Their intereſts might be defeated by a recovery in a real action; be-
1 Inſt. 46 *a.* cauſe the recoveror was ſuppoſed to come in by a title paramount, and was therefore not bound by the con-
Vide Tit. 36. tracts of a former owner. This doctrine has, however, been ſince altered by ſtatute.

§ 11. While eſtates for years might be deſtroyed by the reverſioner, it is no wonder that they were uſually very ſhort; and Lord *Coke*, upon the authority of the *Mirror*, ſays, that by the antient law, no leaſe was allowed for more than 40 years, becauſe a longer poſſeſſion, eſpecially when given without livery, declaring the nature and duration of the eſtate created,
2 Comm. 142. might tend to defeat the inheritance. But Sir *William Blackſtone* obſerves, that this law, if it ever exiſted, was ſoon antiquated; for, in *Madox*'s collection of antient charters, there are ſome leaſes for years of an early date, which conſiderably exceed that period: and that long terms for 300 and 1000 years, were certainly in uſe in the time of *Edw.* 3., and probably in that of *Edw.* 1.; and it appears certain, that after the ſtatute 21 *Hen.* 8. by which terms for years were protected from the operation of feigned recoveries, long terms were frequently created, for the purpoſe of defeating the lord's right of wardſhip, relief, and other feudal incidents: and, in modern times, they have been ſtill more extenſively introduced, in mortgages, and family ſettlements.

A Tenant for Years has no Seiſin.

§ 12. A tenant for years is not ſaid to be ſeiſed, or to have the legal ſeiſin of the lands, the poſſeſſion not

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being delivered to him by the ceremony of livery of ſeiſin; nor does the mere delivery of a leaſe veſt any eſtate in the leſſee, but only gives him a right of entry on the land; and when he has actually entered, the eſtate becomes veſted in him, and he is then poſſeſſed, not properly of the land, but of the term for years, the ſeiſin of the freehold ſtill remaining in the leſſor. Gilb. Ten. 34.

§ 13. This diſtinction between the poſſeſſion of the tenant for years, and the ſeiſin of the freehold, was fully eſtabliſhed in *Bracton*'s time, who ſays: "*Item* "*dare poteſt quis terram quam alius tenet ad terminum* "*annorum, ſalvo tamen firmario termino ſuo, quia iſtæ* "*duæ poſſeſſiones ſeſe compatiuntur in una re, quod unus* "*habeat liberum tenementum, et alius terminum.*"

§ 14. No eſtate for years can be created at common law, without an actual entry made by the perſon to whom the land is demiſed. For, although the grantor has done every thing neceſſary on his part, to complete the contract, ſo that he can never afterwards avoid it, yet, until there is a tranſmutation of poſſeſſion, by the actual entry of the leſſee, it wants the chief mark and indication of his conſent, without which, it might be unwarrantable to adjudge him in actual poſſeſſion to all intents and purpoſes; for which reaſon, the law does not caſt the immediate and actual poſſeſſion on him, until he enters; neither has the leſſor a reverſion to grant, until ſuch entry. But muſt make an Entry. 1 Inſt. 46 *b.* 270 *a* & *b.*

Vide Tit. 11. It ſhould, however, be obſerved, that, in conſequence of the ſtatute of uſes, an eſtate for years may now be created, without an entry.

§ 15. The tenant for years cannot, before entry, maintain an action of treſpaſs or ejectment; becauſe thoſe actions complain of a violation of the poſſeſſion, and therefore cannot be maintained by any perſon who has not had an actual poſſeſſion.

§ 16. The leſſor, by executing the leaſe, has done all that is requiſite on his part, to diveſt himſelf of the poſſeſſion, and to transfer it to the tenant for years;
1 Inſt. 46 *b.* for he has thereby given him ſuch an intereſt, as he may at any time reduce into poſſeſſion by an actual entry on the land, which may be made, not only by the leſſee himſelf, but, in caſe of his death, by his executors or adminiſtrators: and this ſpecies of intereſt is called an *intereſſe termini*.

Eſtates for Years may commence in futuro.

§ 17. An eſtate for years may be created to commence *in futuro*, though an eſtate of freehold cannot; for, where an eſtate for years is created to commence
Vide Tit. 1. ſ. 47. *in futuro*, the freehold is not thereby put in abeyance, but ſtill continues in the leſſor; ſo that he is capable of anſwering the *præcipes* of ſtrangers, which may be brought againſt him; and, before the abolition of military tenures, he was liable to perform the ſervices which were due for the feud.

§ 18. Where an eſtate for years is created to commence *in futuro*, it cannot be executed by an immediate entry, and is therefore an *intereſſe termini*; but ſtill the leſſee may grant it over. And even if a ſtranger enters by wrong, yet ſuch a grant will effectually transfer the leſſee's power of entry, and right of reducing the eſtate into poſſeſſion; for, until the entry of the grantee, the eſtate is not executed, but remains in the ſame plight as it was when the eſtate for years was created: ſo that no intermediate act, either of the grantor or of a ſtranger, can diveſt or diſturb it; becauſe, whoever comes to the poſſeſſion, whether by right or by wrong, takes it ſubject to ſuch future charge, which the leſſee may execute whenever he thinks fit, as by a title prior and paramount to all ſuch intermediate violations of the poſſeſſion.

And may be aſſigned before Entry. 5 Rep. 124 *a*.

Bruerton v. Rainsford, Cro. Eliz. 15.

§ 19. Where a perſon made a leaſe for years to commence in two years, and after the expiration of the two years, but before any entry by the leſſee, the leſſor being ſtill in poſſeſſion, the leſſee granted over his term and intereſt. Reſolved, that ſuch grant was good; becauſe the *intereſſe termini* of the leſſee was not deveſted or turned to a right, but continued in him in the ſame manner as when it was firſt granted; and was ſo transferred over to another, who, by his entry, might reduce it into poſſeſſion, whenever he pleaſed.

Wheeler v. Thoroughgood, Cro. Eliz. 127. 1 Leon. 118.

Vide Saffin's caſe, Tit. 35.

§ 20. If, however, a perſon entitled to an eſtate for years, to commence *in futuro*, once enters, and is afterwards

5 Rep. 124. Cro. Eliz. 15.

wards put out of poſſeſſion; he cannot, in that caſe, grant over his term and intereſt to a ſtranger: for, by his entry, the eſtate for years was actually executed; and being afterwards defeated by the entry of a ſtranger, the leſſee has only a right of entry left in him, which the law will not ſuffer him to transfer over to a ſtranger, no more than a right of action, leſt ſuch a transfer ſhould encourage maintenance.

An Entry before the Leaſe begins is a Diſſeiſin.

§ 21. As the leſſee muſt enter at the time when the leaſe commences, ſo, if he enters before that time, it is a deſſeiſin, and no continuance of poſſeſſion after the commencement of the term, will purge ſuch diſſeiſin, or alter the eſtate of the leſſee. But ſuch entry of the leſſee, before the commencement of the term, will not deveſt or turn ſuch term to a right; ſo that the leſſee of the term may ſtill aſſign it to another.

Hemmings v. Brabaſon, 1 Lev. 45.

§ 22. *A.* made a leaſe to *B.* on the 23d *September*, *habendum* to him for 81 years from *Michaelmas* next enſuing, if *C.* ſhould ſo long live; and from and after the day of the death of *C.* for 31 years more. The leſſee entered the 23d of *September* and continued in poſſeſſion for ſome years: then the leſſor re-entered, and the leſſee, being out of poſſeſſion, after the death of *C.* and during the continuance of the term of 31 years, aſſigned over that term to the plaintiff's leſſor, who being kept out of poſſeſſion, brought an ejectment. Judgement was given for the plaintiff; and the court held, 1ſt, That the term not being to begin until *Michaelmas*, this was, till then, a future intereſt, and the

the leſſee's entry before was a diſſeiſin and not a poſſeſſion by virtue of the leaſe. 2dly, That whether this leaſe for 31 years were only a continuance of the firſt term, and that both together made but one term, as *Bridgman* held, or whether they were two diſtinct terms, as others held, yet either way, it was not turned to a right by the entry of the leſſor; for if a ſtranger had entered after *Michaelmas*, and diſſeiſed the leſſor, this would not have turned the term to a right; becauſe, as to that, the time of entry of the leſſee was not come, no more will the entry of the leſſor turn it to a right; and, therefore, it was well aſſignable to the plaintiff's leſſor, eſpecially if it ſhould be taken as a future intereſt, as ſome held it ſhould, for then the leſſee was never in poſſeſſion by virtue thereof; and, conſequently, the leſſor's entry could not turn it to a right.

§ 23. Where the commencement of an eſtate for years is limited, from a time paſt, and the leſſee is in poſſeſſion prior to that period, it ſhall be intended that he entered and occupied before by agreement; and, therefore, it is not a diſſeiſin.

Waller v. Champian, Cro. Eliz. 506.

§ 24. A term for years is conſidered in law as a chattel real, being an intereſt iſſuing out of a real eſtate, of which it has one quality, immobility, which denominates it real; but wants the other, namely, a ſufficient legal indeterminate duration; the utmoſt period for which it can laſt being fixed and determined.

A Term for Years is a Chattel.

2 Comm. 385.

§ 25. In

§ 25. In conſequence of this principle, an eſtate for years does not deſcend to the heir of the perſon who was laſt poſſeſſed of it, but veſts in his executors or adminiſtrators, like any other kind of perſonal eſtate. And although lands are now frequently demiſed for 500 and 1000 years, yet the ſucceſſion continues the ſame.

1 Inſt. 9 *a.* 90 *a.*

§ 26. If a leaſe be made to a biſhop, parſon, or any other ſole corporation, and his ſucceſſors, for a certain number of years, yet it ſhall go to the executors of the leſſee; becauſe a term for years being only a chattel, the executors or adminiſtrators are the only perſons the law allows to ſucceed thereto: and this ſucceſſion to a chattel cannot be altered or controled by any limitation of the party. But the king, by his prerogative, may take a chattel in ſucceſſion.

2 Comm. 506.

§ 27. Terms for years paſs from executor to executor *in infinitum*. But whenever the courſe of repreſentation from executor to executor is interrupted by one adminiſtration, it then becomes neceſſary for the ordinary to commit adminiſtration afreſh, of the goods of the perſon who was laſt poſſeſſed of the term in his own right, not adminiſtered by the former executor. A limited or ſpecial adminiſtration only, may alſo be granted, viz. of certain ſpecific effects. And it is a common practice to obtain a ſpecial adminiſtration of a term for years.

Caſes and Opinions, v. 1. 399.

§ 28. Where a perſon appoints two or more executors, if only one of them acts, he alone will become entitled

entitled to any terms for years, whereof the teſtator died poſſeſſed, and may aſſign them accordingly.

§ 29. Where there are ſeveral executors who all act, they have a joint and ſeveral intereſt in all the goods and chattels of the teſtator; and, therefore, if one of them only diſpoſes of a term for years, it is good.

Dyer, 23 *b.* 10 Mod. 324. 1 Ab. Eq. 319. 1 Atk. 460.

§ 30. Every eſtate which muſt expire at a certain and fixed period, by whatever words created, is an eſtate for years, and therefore it is frequently called a term, *terminus*, becauſe its duration or continuance is bounded, limited, and determined. For every eſtate muſt have a certain beginning, and a certain end; which muſt be aſcertained at the time when the eſtate is created, either by the expreſs limitation of the parties, or by a reference to ſome collateral act, which may with equal certainty meaſure the continuance thereof, otherwiſe it will be void.

Eſtates for Years muſt have a fixed Period.

The inveſtigation of this ſubject will, however, find its place more properly under Title 32. Deeds.

§ 31. Though an eſtate of freehold cannot be made to ceaſe by the direction of the parties, but muſt be taken from the perſon in whom it is veſted, by the ſame means by which it was given to him, yet it is otherwiſe in the caſe of an eſtate for years; for that may be made to ceaſe by a proviſo in the conveyance itſelf, upon the performance of any previous act; and therefore the practice in conveyancing has long been, where terms for years

May determine by Proviſo.

years are created, to inſert a proviſo, that when the truſts of the term are ſatisfied, the term itſelf ſhall ceaſe and determine.

A Freehold cannot be derived from an Eſtate for Years.

Butt's caſe, 7 Rep. 23 *a.* 25 *a.*

§ 32. An eſtate of freehold cannot be derived from an eſtate for years. Thus, where a rent was granted for life, out of a long term for years, it was reſolved to be a good charge as long as the term laſted; but it was only a chattel, and not a freehold, for it was repugnant to have a frank-tenement out of a term for years.

TITLE VIII.

ESTATE FOR YEARS.

CHAP. II.

Of the Incidents to Eſtates for Years.

§ 1. *Eſtovers.*
2. *Emblements.*
4. *Subject to ſimple contract Debts.*
5. *Tenant cannot commit Waſte.*
11. *Accidents by Fire.*
12. *Clauſe without Impeachment of Waſte.*
17. *May be limited for Life.*
18. *But not Intailed.*
21. *Where Terms for Years are involved in the ſame Limitations with Freeholds.*
23. *Merged by a Union with the Freehold.*
24. *Exceptions.*
30. *And alſo by a Surrender.*
31. *Merger of a Term for Years in a Term for Years.*
32. *Equity relieves againſt Merger.*
34. *What is a Forfeiture.*

Section 1.

EVERY tenant for years has incident to and inſeparable from his eſtate, unleſs reſtrained by ſpecial agreement, the ſame eſtovers to which tenants for life are entitled. Eſtovers. 1 Inſt. 41 *b.*

§ 2. Where the determination of an eſtate for years is certain, as where lands are let for a certain number of years, the tenant ſhall not have emblements; becauſe it was his own folly to ſow, when he knew he could not reap. But where the determination of an eſtate for years depends on an uncertain event, as, where lands are let for a term of years determinable upon Emblements. Lit. ſ. 68. 1 Inſt. 56 *a.*

upon a life or lives, there the tenant will be entitled to emblements, in the ſame manner as a tenant for life.

1 Inſt. 55 *b.*

§ 3. If, however, an eſtate for years determines by the act of the tenant himſelf, as if he commits a forfeiture, he will not be entitled to emblements.

Subject to ſimple contract Debts.

2 Inſt. 396.

Fleetwood's caſe, 8 Rep. 171.

§ 4. An eſtate for years being only a chattel intereſt, is ſubject to the payment of ſimple contract debts; and is alſo liable to be ſold by execution, for the payment of debts due by judgment. But a *bonâ fide* ſale of a term for years is good againſt all creditors, and even againſt the Crown.

The Tenant cannot commit Waſte.

Lit. ſ. 71.

§ 5. An eſtate for years being an intereſt much inferior to an eſtate for life, the tenant has only a right to the temporary profits of the land, and therefore cannot cut down timber trees, or commit any other kind of waſte on the land. A tenant for years is alſo puniſhable for permiſſive waſte, and is therefore bound to keep all houſes and other buildings upon the land, in proper and tenantable repair.

1 Inſt. 54 *b.*

§ 6. Lord *Coke* ſays, that if a houſe be ruinous at the time of the leaſe made, if the leſſee ſuffers the houſe to fall down, he is not puniſhable; for he is not bound by law to repair the houſe in that caſe. And yet, if he cuts down timber upon the ground ſo letten, and repair it, he may well juſtify it.

Vide Tit. 3. ſ. 36.

§ 7. The ſtatutes of *Marlbridge* and *Glouceſter* extend to tenants for years, ſo that they are liable to the

the ſame actions, and the ſame penalties, as tenants for life.

§ 8. It is enacted by the ſtatute 11 *Hen.* 6. c. 5., that where a tenant for years aſſigns over his eſtate, and continues in the receipt of the profits, an action of waſte lies againſt him. And in a caſe upon this ſtatute in 36 *Eliz.*, it was reſolved, 1ſt, That every aſſignee of the firſt leſſee, mediate or immediate, was within the act; for the ſtatute was made to ſuppreſs fraud and deceit, and therefore ſhall be taken beneficially. 2dly, That the perſon in remainder was within the act, as well as the perſon in reverſion, becauſe in equal miſchief. 2 Inſt. 302. Booth's caſe, 5 Rep. 77.

§ 9. If a leſſee for years dies, after having committed waſte, no action of waſte will lie againſt his executors or adminiſtrators. But the executors or adminiſtrators of a tenant for years are puniſhable for waſte done while they are in poſſeſſion. 1 Inſt. 302.

§ 10. The king is not within the ſtatute of *Glouceſter*; and therefore, where he is tenant for years, or where an eſtate for years becomes veſted in him by forfeiture, no action of waſte will lie againſt him.

§ 11. Tenants for years are exempted by the ſtatute 6 *Ann.* c. 31., from all actions for damages on account of accidental fire. But, in a modern caſe, where there was a covenant in a leaſe for years of a houſe, to repair without any exception, and the houſe was burnt down Accidents by Fire, Vide Tit. 3. ſ. 59. Bullock v. Dommitt, 6 Term R. 650.

down by accident, it was held by the Court of King's Bench, that the leſſee was bound to rebuild the houſe. And Lord *Kenyon* mentioned, that Mr. *Wilbraham's* chambers in *Lincoln's-Inn*, having been burnt down in the year 1754, he, after taking the opinion of his profeſſional friends, found it neceſſary to rebuild them.

Clauſe without Impeachment of Waſte.

Tit. 3. f. 61.

§ 12. Where the clauſe, without impeachment of waſte, is inſerted in a leaſe or demiſe for years, it will have the ſame effect, as where it is inſerted in a conveyance of an eſtate for life. And the Court of Chancery will reſtrain the import of it, in the ſame manner as in the caſe of an eſtate for life.

§ 13. The Court of Chancery will not permit a tenant for years, without impeachment of waſte, to fell timber, juſt before the expiration of his leaſe.

Abraham v. Bubb, 2 Freem. 63.

§ 14. A leaſe was made by a biſhop for 21 years, without impeachment of waſte, of lands upon which there were ſeveral trees. The tenant did not cut down any of the trees, until about half a year before the expiration of his term, but then began to fell them.

Upon an application to the Court of Chancery, an injunction was granted againſt the tenant, for, although he might have felled trees every year, from the beginning of the term, and then they would have been growing up gradually, yet it was unreaſonable that he ſhould let them grow until near the end of his term, and then cut them all down.

§ 15. A tenant

§ 15. A tenant for years, without impeachment of waſte, will not be allowed by the Court of Chancery to dig and carry away the ſoil to make bricks.

§ 16. The Biſhop of *London* made a long leaſe of ſome lands at *Ealing* in *Middleſex*, without impeachment of waſte, of which there were about twenty years unexpired. The leſſee articled with ſome brickmakers that they might dig and carry away the ſoil. The biſhop applied to the Court of Chancery for an injunction, which was granted. Bp. of Lon. v. Webb, 1 P. Wms. 527.

§ 17. An eſtate for years may be limited to a perſon for life, with a remainder over to any other perſon, or number of perſons, for life, provided they are all in exiſtence at the time. May be limited for Life.

§ 18. But the diſpoſition of a term for years to a perſon and the heirs of his body, is a diſpoſal of the entire intereſt in the term, ſo that, after ſuch a limitation, no remainder over can be limited; for, in fact, nothing remains. This doctrine is founded on the principle, that terms for years cannot be intailed: Firſt, becauſe they are not within the ſtatute *De Donis*, not being eſtates of inheritance: Secondly, becauſe, if a term for years was allowed to be intailed, it would be unalienable; as the grantee of a term limited in this manner could not bar his iſſue, or the perſons in remainder by fine or recovery. But not intailed. Tit. 2.

§ 19. A diſtinction has been made by Lord *Coke* between a limitation of a term in groſs, (as a term for 10 Rep. 87 *a*.

500 years), to a man and the heirs of his body, and a ſimilar limitation of a term *De Novo.* In the latter caſe, his Lordſhip was of opinion, that the term would only continue in the perſon to whom it was thus limited, as long as he had heirs of his body; and that, upon failure of iſſue of the body of the perſon to whom it was thus limited, the term would ceaſe. But this diſtinction has been long ſince exploded.

Hayter v. Rod, 1 P. Wms. 360.

§ 20. *Ambroſe Pile*, by indenture, demiſed the premiſes to a truſtee, his executors and adminiſtrators, for 99 years, in truſt for himſelf and his wife for their lives, and the life of the ſurvivor, and, after the death of the ſurvivor, in truſt for the heirs of their two bodies; and in default of ſuch iſſue, then in truſt for the heirs of the ſurvivor of the huſband and wife. The huſband and wife had iſſue one ſon, *James Pile.* The huſband died, afterwards the ſon died, an infant, and without iſſue: and the mother adminiſtered to her huſband and ſon, and aſſigned the term to the defendant *Rod.* The queſtion was, Who was entitled to the truſt of this term? Whether it belonged to the plaintiff, who was the heir at law of *Ambroſe Pile*, or the defendant *Rod*, as aſſignee of the wife. It was decreed, that the term belonged to *Rod*, the aſſignee of the wife, and did not ceaſe for the benefit of the heir.

Terms for Years involved in the ſame Limitations with Freeholds.

§ 21. Where terms for years are involved in the ſame limitations with freehold eſtates, carried on in ſtrict ſettlement, that is, where they are limited to *A.* for life, remainder to his firſt and other ſons in tail male, remainder over to ſeveral other perſons in the

ſame

ſame manner, without making any diſtinction between them; if any of the tenants for life have a ſon, the whole reverſionary intereſt in the term will veſt in ſuch ſon, ſubject to the preceding eſtates for life, and the contingency of the preceding tenants for life having ſons; and will, on the death of ſuch ſon, though ever ſo ſoon after his birth, go to his father, though one of the tenants for life, as his next of kin, upon the father's taking out adminiſtration to his ſon, in prejudice of all perſons claiming under the ſubſequent limitations.

§ 22. *John* Duke of *Newcaſtle*, being poſſeſſed of divers lands and tenements held by leaſe from the Crown for the term of 99 years, deviſed all his eſtates, as well leaſehold as freehold, to *Thomas* Lord *Pelham* for life, remainder to his firſt and other ſons in tail male; remainder to *Henry Pelham* for life, remainder to his firſt and other ſons in tail male; remainder to *William Vane* for life, remainder to his firſt and other ſons in tail male; remainder over. *Thomas*, Lord *Pelham*, who was afterwards Duke of *Newcaſtle*, never had a ſon; but *Henry Pelham* had two ſons, both of whom died in his life-time, viz. *Thomas* and *Henry*. *Thomas* the eldeſt being the perſon in whom the firſt eſtate tail in the order of limitation was veſted by virtue of the will. *Henry Pelham* ſoon afterwards died, having made his will, and appointed *Richard Arundel* and *H. Perkins* his executors; and letters of adminiſtration of the perſonal eſtates of *Thomas Pelham*, the infant, were alſo granted to the ſaid *Arundel*. *William Vane* had iſſue two ſons, *Chriſtopher* the eldeſt, who

Pelham v. 1760. 3 Bro. Parl. Ca. 204.

died an infant without iſſue, and *William* his ſecond ſon. *William*, who became Lord *Vane*, took out letters of adminiſtration to his brother *Chriſtopher*, and thereby became entitled to all ſuch intereſt in the leaſehold premiſes as veſted in his brother *Chriſtopher*, who was the firſt perſon *in eſſe*, in point of time, who took any eſtate of inheritance in the freehold premiſes. *Arundel* and *Perkins* filed their bill againſt Lord *Vane* and others, ſtating the above facts; and further, that they, as executors of the ſaid *Henry Pelham*, and as adminiſtrators of the perſonal eſtate of *Thomas*, the infant ſon of *Henry Pelham*, were become entitled to the abſolute intereſt in the leaſehold terms, ſubject to the life eſtate of the Duke of *Newcaſtle*, and the contingency of his having a ſon born alive. And being ſo entitled, they had entered into an agreement in writing with *George Gregory* for the ſale of thoſe terms; and prayed that the agreement might be performed ſpecifically, and carried into execution,

Lord *Vane* put in his anſwer, inſiſting, that his brother *Chriſtopher* was the firſt perſon *in eſſe*, in point of time, who took any eſtate of inheritance in the premiſes; and that he dying an infant, and without iſſue, Lord *Vane*, as the only ſon and ſurviving heir of his father *William Vane*, became the firſt perſon *in eſſe*, who took an eſtate of inheritance in any of the premiſes, by virtue of the limitations in the will: and denied, that the abſolute eſtate and intereſt in the leaſehold terms ever veſted in *Thomas Pelham*. The cauſe was heard before the Lord Keeper, who diſmiſſed the bill with coſts. The plaintiffs having appealed from

this

this decree to the Houſe of Lords, the following queſtions were put to the judges: 1ſt, Whether the property of the leaſehold eſtates for years, deviſed by the will of the Duke of *Newcaſtle*, veſted in *Thomas Pelham*, the infant ſon of *Henry Pelham* deceaſed, ſubject to the Duke of *Newcaſtle's* intereſt therein for his life, and to the contingency of the Duke's having a ſon. 2d. Whether the property of the ſaid leaſehold eſtates, ſubject as aforeſaid, was tranſmitted to the repreſentative of the ſaid *Thomas Pelham* the infant.

The Lord Chief Baron of the Exchequer, and Mr. Juſtice *Deniſon* being preſent, the Lord Chief Baron delivered their concurrent opinion upon the ſaid two queſtions, in the affirmative. Whereupon it was declared, that the leaſehold eſtates for years deviſed by the will of the late Duke of *Newcaſtle*, ſubject to the then preſent Duke's intereſt therein for his life, and defeaſible by the ſaid Duke's having a ſon, belonged to the appellants, as ſtanding in the place of the ſaid *Thomas Pelham*, the infant ſon of *Henry Pelham*, deceaſed; and that the agreement entered into between them and *George Gregory*, for the ſale of them, ought to be carried into execution.

Vide Foley v. Burnell, 4 Bro. Parl. Ca. 319.

§ 23. Where a term for years become veſted in the perſon who is ſeiſed of the freehold, the term is merged and extinguiſhed. There are, however, ſeveral exceptions to this rule, not only where ſuch union is temporary, but even where it is permanent.

Merged by Union with the Freehol

Exceptions.

1 Inſt. 338 *b.*

§ 24. No merger will take place unleſs the freehold and the term for years come to one perſon, in one and the ſame right; for if a perſon, having the freehold in his own right, acquires a term for years in the ſame land in the right of another, there will be no merger.

1 Inſt. 338 *b.*
1 Freem. 289.

§ 25. Thus, if a tenant for years dies, having appointed the perſon who is ſeiſed of the freehold to be his executor, whereby the term for years becomes veſted in him, it will not merge; for he has the freehold in his own right, and the term for years in right of his teſtator.

Bracebridge v. Cook, Plowd. 417.
1 Inſt. 338 *b.*

§ 26. If a perſon, ſeiſed of a freehold eſtate in certain lands, marries a woman who has a term for years in the ſame land, there will be no merger of the term; for the huſband has the freehold in his own right, and the term for years in right of his wife.

Plowd. 420.

§ 27. In the above caſe it was ſaid at the bar, that if parſon, patron, and ordinary make a leaſe for years of the glebe land of the parſonage, and afterwards the parſon dies, and the leſſee for years is made parſon, and afterwards dies, his executors ſhall not have the reſidue of the ſaid term; becauſe it was merged in the freehold, which the parſon had in him. But *Catline* Ch. Juſt. denied this, ſaying, that the parſon had the term in his own right and in the capacity of his natural body, and the inheritance he had as parſon, which is another

another capacity; and, therefore, the term ſhould not be merged.

§ 28. Lord *Coke* has laid it down, that although a man may have a freehold in his own right, and a term for years in right of another, as in the preceding caſes, yet that a man cannot have a term for years in his own right, and a freehold in right of another; and, therefore, that if a man, leſſee for years, intermarries with the feme leſſor, this ſhall merge his term. 1 Inſt. 338 *b.*

§ 29. This rule, however, admits of ſeveral exceptions. For where a perſon, poſſeſſed of a term for years, married, and afterwards the inheritance deſcended upon his wife, it was held, that the term for years was not thereby merged; becauſe the deſcent was an act of law, which the huſband could not prevent; and, therefore, it ſhould not turn to his prejudice, but he ſhould have the inheritance in right of his wife, and the term for years in his own right, as he had before. Platt v. Sleap, Cro. Ja. 275.

§ 30. A merger of a term for years may alſo take place in conſequence of a ſurrender, which is the yielding up of an eſtate for years to the perſon in remainder or reverſion. But a term for years cannot be merged by ſurrender, until the tenant has entered; for, until entry, there is no reverſion in which the term can merge. If, however, the tenant enters, and aſſigns his eſtate to another, the aſſignee may merge the term by ſurrender before entry; becauſe, by the entry of And alſo by a Surrender. 2 Roll. Ab. 494.

the leſſee, the poſſeſſion was ſevered and divided from the reverſion.

Merger of a Term for Years in a Term for Years.

Bac. Ab. Tit. Leaſe. (S.)

§ 31. Where the eſtate in reverſion or remainder was only for years, it was doubted whether a term for years in poſſeſſion might be ſurrendered, ſo as to merge therein; but Lord Chief Baron *Gilbert* ſtates it as ſettled, that ſuch ſurrender is good, and ſhall merge the firſt term: wherein it was agreed, 1ſt, That if the term in reverſion were greater than the term in poſſeſſion, the greater would merge the leſs; as ten years may be ſurrendered and merged in twelve or fourteen years. 2dly, That though the reverſion were for a leſs number of years, yet the ſurrender would be good, and the firſt term drowned: as if one were leſſee for 20 years, and the reverſion expectant thereon were granted to one for a year, who granted it over to the leſſee for 20 years, that this would work a ſurrender of the 20 years term, as if he had taken a new leaſe for a year of his leſſor; for the reverſionary intereſt, coming to the poſſeſſion, drowns it, and the number of years is not material; for as he may ſurrender to him who hath the reverſion in fee, ſo he may to him who hath the reverſion for any leſs term. The merger of terms is ſaved by the ſtatute of uſes. Vide Title XI. Uſe, ch. iii.

Equity relieves againſt Merger.

1 Vern. 90. 348. 457.

§ 32. A court of equity will, in ſome caſes, relieve againſt the merger of a term, and make it anſwer the purpoſes for which it was intended.

§ 33. A perſon,

§ 33. A perſon, having a term for 1000 years, aſſigned it to the owner of the inheritance, in truſt for his wife and children; and the aſſignee accepted the truſt, and declared the purpoſes of it. The Court of Chancery ſupported the truſt, notwithſtanding the merger of the term in the inheritance, and decreed the heir of the aſſignee of the term to make a further aſſurance of the reſidue of the term to a purchaſer from the ſon of the aſſignor. Sanders v. Boumford, Finch. R. 424.

§ 34. Tenant for years may aſſign his eſtate to any other perſon, or create a ſmaller eſtate than his own. But if he attempts to create a greater eſtate than he lawfully can, whereby the remainder or reverſion is deveſted, it will operate as a forfeiture of his eſtate. And Lord *Coke* ſays, that if tenant for life or years of land, the reverſion or remainder in the king, makes a feoffment in fee, this is a forfeiture; and yet no reverſion or remainder is deveſted out of the king; and the reaſon is, in reſpect of the ſolemnity of the feoffment with livery, tending to the king's diſherſion. What is a Forfeiture. 1 Inſt. 251 *b*, Dyer, 362 *b*, Cro. Eliz. 322.

§ 35. It was held, in a modern caſe, that if a tenant for years makes a leaſe for a longer term than he has, it is no diſſeiſin, nor forfeiture; becauſe it is only a contract between him and his leſſee, which does not operate on the intereſt of the leſſor to affect it with any prejudice. 1 Salk. 187.

§ 36. A conveyance by leaſe and releaſe, or bargain and ſale, is no forfeiture. Neither is an eſtate for years Vide Tit. 32.

years forfeited if the perſon in reverſion or remainder in fee is a party to the conveyance; for, in that caſe, each perſon transfers only what he may lawfully alien.

6 Rep. 15 *a.*

Vide Tit. 3. f. 97.

§ 37. With reſpect to forfeiture by matter of record, it may be laid down as a general rule, that every act by matter of record, which operates as a forfeiture of an eſtate for life, will alſo operate as a forfeiture of an eſtate for years.

TITLE IX.

ESTATE AT WILL AND AT SUFFERANCE.

CHAP. I.

Of an Eſtate at Will.

CHAP. II.

Of an Eſtate at Sufferance.

CHAP. I.

Of an Eſtate at Will.

§ 1. *Deſcription of an Eſtate at Will.*
9. *It is at the Will of both Parties.*
10. *Not grantable over.*
12. *Tenant at Will entitled to Emblements.*
13. *But cannot commit Waſte.*
17. *What determines an Eſtate at Will.*
23. *Half a Year's Notice to quit muſt be given.*
24. *Acceptance of Rent is not a Waiver of Notice.*
26. *Tenancies from Year to Year.*
35. *Half a Year's Notice to quit neceſſary.*
38. *A Diſtreſs for Rent is a Waiver of a Notice to quit.*

Section 1.

Deſcription of an Eſtate at Will.

"TENANT at will (ſays *Littleton*) is, where lands "or tenements are let by one man to another, "to have and to hold to him at the will of the leſſor, "by force of which leaſe the leſſee is in poſſeſſion. "In this caſe the leſſee is called *tenant at will*, becauſe "he Lit. ſ. 68.

" he hath no certain nor ſure eſtate; for the leſſor " may put him out at what time it pleaſeth him."

§ 2. This ſpecies of eſtate is of great antiquity, for
27 *a.* *Bracton* ſays: " *Item dare poterit quis alicui terram ad* " *voluntatem ſuam, et quamdiu ei placuerit, de termino in* " *terminum, et de anno in annum, et in quo caſu, ille qui* " *accipit nullum habet liberum tenementum, cum dominus* " *proprietatis rem ſic conceſſam repetere poſſit, ſicut a* " *precario.*"

f. 82., § 3. *Littleton* ſays, that if a man lets lands to another, to have and to hold to him and to his heirs, at the will of the leſſor, the words *to the heirs of the leſſee* are void; for, if the leſſee dieth and his heir enters, the leſſor ſhall have an action of treſpaſs againſt him.

1 Inſt. 55 *a.* n. 1. § 4. Where a leaſe was made for years, with a proviſo that the leſſor might enter at his will, this was held to be only a leaſe at will.

Cudlip v. Rundle, 1 Show. Rep. 288. § 5. A perſon demiſed two houſes for ſeven years, excepting and reſerving the new houſe for the uſe of the leſſor, if he ſhall pleaſe to dwell therein, but not to be let to any other perſon; at all times, when he does not live there, to be to the uſe of the leſſee. It was determined, that the leſſee, by occupying the new houſe, became tenant at will.

§ 6. Eſtates at will may ariſe by implication as well by expreſs words. Thus, if tenant for years holds over

his term, and continues to pay his rent quarterly as before, ſuch payment and acceptance of rent will amount to a leaſe at will. Allen, 4. Brownl. 30. 43.

§ 7. If *A.* makes feoffment to *B.* and delivers him the deed, but does not give him livery of ſeiſin; if *B.* enters, he becomes tenant at will. Lit. ſ. 70.

§ 8. It was reſolved, in a modern caſe, that where a perſon entered and enjoyed lands under a leaſe that was void, and paid rent, he was tenant at will. Denn v. Fearnſide, 1 Wilſ. Rep. 176.

§ 9. Lord *Coke* ſays, that every leaſe at will muſt, in law, be at the will of both parties; and, therefore, when a leaſe is made to have and to hold at the will of the leſſor, the law implieth it to be at the will of the leſſee alſo; for it cannot be only at the will of the leſſor, but it muſt be at the will of the leſſee alſo. And ſo it is when the leaſe is made to have and to hold at the will of the leſſee, this muſt be alſo at the will of the leſſor. It is at the Will of both Parties. 1 Inſt. 55 *a.*

§ 10. A tenant at will has no certain and indefeaſible eſtate, nothing that can be aſſigned by him to another; becauſe the leſſor may determine his will and put him out whenever he pleaſes: and, therefore, if a tenant at will grants over his eſtate to another, and the grantee enters, ſuch grantee is a diſſeiſor, and the landlord may have an action of treſpaſs againſt him. Not grantable over. 1 Inſt. 57 *a.*

§ 11. A leſſee

Blunden v. Baugh, Cro. Car. 302.

§ 11. A leſſee at will made a leaſe for years, and the leſſee entered. Reſolved, on ſolemn argument, 1ſt, That it was only a diſſeiſin at election, and not *primâ facie*. 2dly, That, admitting it to be a diſſeiſin, the leſſee at will, and not the leſſee for years, was the diſſeiſor, and had gained the freehold.

Tenant at Will entitled to Emblements. Lit. ſ. 68. 1 Inſt. 55 *b*. 5 Rep. 116.

§ 12. Where an eſtate at will is determined by the leſſor, the tenant at will is entitled to the corn ſown, and other emblements; otherwiſe, where an eſtate at will is determined by any act done by the leſſee.

But cannot commit Waſte. 1 Inſt. 57 *a*.

§ 13. Tenant at will has no power of committing any kind of voluntary waſte. But ſtill he is not within the ſtatute of *Glouceſter*; and, therefore, no action of waſte lies againſt him. If, however, a tenant at will cuts down timber trees, or pulls down houſes, the leſſor ſhall have an action of treſpaſs againſt him.

Lit. ſ. 71.

§ 14. With reſpect to permiſſive waſte, there is no remedy whatever againſt tenant at will; for he is not bound to repair or ſuſtain houſes like tenant for years.

Lady Shrewſbury's caſe, 3 Rep 13 *b*. 1 Show. 288.

§ 15. The Counteſs of *Shrewſbury* brought an action on the caſe againſt a perſon to whom ſhe had leaſed a houſe at will, which was burnt down by accident; and it was reſolved, that for this permiſſive waſte, no action lay, becauſe, at the common law, no remedy lay for waſte, either voluntary or permiſſive, againſt tenant for life or years: ſo, and for the ſame reaſon,

Vide Tit. 8. ch. 2.

reaſon, a tenant at will ſhall not be puniſhed for permiſſive waſte, not being within the ſtatute of *Glouceſter*. Vide Tit. 8. ch. 2.

§ 16. Mr. *Hargrave* obſerves, that this doctrine ſhould be underſtood with ſome limitation; for if tenant at will ſtipulates with his leſſor to be reſponſible for fire, by negligence, or for other permiſſive waſte, without doubt, an action will lie on ſuch expreſs agreement. 1 Inſt. 57 *a*. n. 1. Vide Tit. 8. ch. 2.

§ 17. With reſpect to acts which amount to a determination of an eſtate at will, on either ſide, the firſt and moſt obvious mode of determining an eſtate at will by the leſſor, is by an expreſs declaration that the leſſee ſhall hold no longer, which muſt either be made on the land, or elſe notice of it muſt be given to the leſſee. What determines an Eſtate at Will. 1 Inſt. 55 *b*.

§ 18. Any act of ownerſhip exerciſed by the leſſor on the land, which is inconſiſtent with the nature of this eſtate, will operate as a determination of it. Thus, if the landlord enters on the land, and cuts down trees demiſed, or makes a feoffment, or leaſe for years, to commence immediately, the eſtate at will is thereby determined. Id.

§ 19. On the other ſide, any act of deſertion, or which is inconſiſtent with an eſtate at will, done by the tenant, operates as a determination of the eſtate. Thus, if the tenant aſſigns over the land to another, or commits any act of waſte, his eſtate is thereby determined. But a verbal declaration by the leſſee that 1 Inſt. 57 *a*. 1 Inſt. 55 *b*. n. 15.

that he will not hold the lands any longer, does not determine the eſtate, unleſs he waives the poſſeſſion.

5 Rep. 116 *b.*

§ 20. The death or outlawry of either the landlord or tenant, will operate as a determination of an eſtate at will. And in a modern caſe it was held, that an act of treaſon determines an eſtate at will.

1 Wilſ. Rep. 176.

1 Salk. 115.

§ 21. Neither party can determine an eſtate at will, at a time which would be prejudicial to the other; and therefore, if the leſſee determines his will, before the day on which the rent is due, he muſt, notwithſtanding, pay the rent up to that time. For, otherwiſe, it would be a determination of the will to avoid payment of the rent.

1 Salk. R. 413, 414. 2 Salk. R. 222. Leighton v. Thud, 1 Ld. Raym. 707.

§ 22. If the landlord determines his will before the rent is due, he will loſe it. But if either party dies before the rent is due, this act of God ſhall not be productive of any injury: for the leaſe, if it be a houſe, ſhall continue until the next rent-day; and if it be a leaſe of lands commencing at *Michaelmas*, it ſhall continue until the Summer profits are received by the tenant at will, or his repreſentatives.

Half a year's Notice to quit muſt be given. Parker v. Conſtable, 3 Wilſ. R. 25.

§ 23. It was unanimouſly reſolved in a modern caſe, that half a year's notice to quit muſt be given by a landlord to his tenant at will, or his executors; before the end of which time, an ejectment will not lie.

Acceptance of Rent is not a Waiver of Notice.

§ 24. The acceptance of rent for occupation, by a landlord, ſubſequent to the time when the tenant ought

to have quitted, according to a notice given to him for that purpoſe, is not, of itſelf, a waiver on the part of the landlord of ſuch notice, but matter of evidence only, to be left to the jury, under the circumſtances of the caſe.

§ 25. The defendant was tenant at will to the leſſor of the plaintiff, who, to determine the tenancy, gave notice at *Lady Day* to the defendant to quit at *Michaelmas*. The defendant not quitting at *Michaelmas*, the plaintiff brought an ejectment, and laid his demiſe on the 30th *September*. The defendant appeared and pleaded. Some time after the plea was put in, the leſſor received of the tenant a quarter's rent due at *Chriſtmas*. The defendant's counſel inſiſted, that this ſubſequent acceptance of rent, ſubſequently due, was a waiver of the notice, and tantamount to an agreement that the defendant ſhould continue tenant. Lord *Mansfield*, thinking the practice was ſo, directed the jury to find for the defendant. But, afterwards, his Lordſhip ſaid, that he had his doubts reſpecting the propriety of this doctrine, and therefore deſired a motion might be made for a new trial, which was made accordingly. Upon which, the court ſaid, that the acceptance of rent was not, in itſelf, a waiver of the notice, but it ought to have been left to the jury to determine *quo animo* the rent was received: if the truth of the caſe appeared, that both parties intended the tenancy ſhould continue, there would be an end of the plaintiff's title; if not, the plaintiff would not be barred of his remedy by ejectment.

Doe ex. Dem. Cheny v. Batten, Cowp. 243.

Tenancies from Year to Year.

2 Comm. 147.

§ 26. The courts of law have, of late years, learned as much as poſſible againſt conſtruing demiſes, where no certain term is mentioned, to be eſtates at will; but have rather held them to be tenancies from year to year, as long as both parties pleaſe, eſpecially where an annual rent is reſerved. And, in a modern caſe, Mr. Juſtice *Wilmot* is reported to have ſaid; "In the "country, leaſes at will, in the ſtrict legal notion of "a leaſe at will, being found extremely inconvenient, "exiſt only notionally; and were ſucceeded by an- "other ſpecies of contract, which was leſs inconve- "nient."

3 Burr. R. 1609.

1 Inſt. 55 *a*. n. 3.

Mr. *Hargrave*, in his notes on the firſt *Inſtitute*, remarks on the above paſſage, that it means, not that eſtates at will may not ariſe now, as well as formerly, but only, that it is no longer uſual to create ſuch eſtates, by expreſs words; and that the judges incline ſtrongly againſt implying them.

§ 27. A general parol demiſe at an annual rent, where the bulk of the farm is incloſed, and a ſmall part in open common fields, is only a tenancy from year to year.

Roe v. Rees, 2 Black. Rep. 1171.

§ 28. An action was brought to recover poſſeſſion of a farm in *Auſtrey*, of about 60 acres, of which, 51 were incloſed, and the reſt lay in open fields. The taking was in 1767, from old *Lady Day* preceding, without any fixed term, at 40 *l. per annum* rent, payable at *Michaelmas* and *Lady Day*. It was proved,

that a cuſtom prevailed in *Auſtrey*, that when a tenant took a farm, in which there was any open field land, more or leſs, for an uncertain term, it was conſidered as a holding from three years to three years.

De Grey, Chief Juſtice.—"All leaſes for uncertain "terms, are, *primâ facie*, leaſes at will; it is the re- "ſervation of an annual rent, that turns them into "leaſes from year to year. It is poſſible, that circum- "ſtances may make it a leaſe for a longer term; as, "where the crop (as liquorice, madder, &c.) does "not come to perfection in leſs than two years: and "I will not ſay that the nature of the ground, or the "courſe of huſbandry, may not deſerve to be conſi- "dered, when ſuch a caſe comes nakedly before the "court. As a cuſtom, this claim of the tenant can- "not be ſupported."

Adjudged that this was a leaſe from year to year.

§ 29. Where an agreement for a longer term than three years is made by parol, which is void as to the duration of the term, there is a tenancy from year to year, regulated in every other reſpect by the agreement. Doe v. Bell, 5 Term Rep. 471.

§ 30. Where a tenant for life granted a leaſe for years, which was void againſt the remainder man, and the latter, before he elected to avoid it, received rent from the tenant, it then was held to be a tenancy from year to year. Doe v. Weller, 7 Term Rep. 478.

Birch v. Wright, 1 Term R. 378. Maddon v. White, 2 Term Rep. 159.

§ 31. When a tenancy from year to year has commenced, it continues againſt any perſon to whom the leſſor may afterwards grant the reverſion; and alſo, againſt any perſon to whom the reverſion may come, though ſuch perſon be an infant.

§ 32. In the caſe of a tenancy from year to year, the intereſt of the tenant does not determine by his death, but devolves on his executors.

Doe v. Porter, 3 Term Rep. 15.

§ 33. A perſon having an eſtate from year to year, died inteſtate, and the queſtion was, what intereſt veſted in his adminiſtrator. Lord *Kenyon* ſaid, "That whatever chattel the inteſtate had, muſt veſt in the adminiſtrator, as his perſonal repreſentative. Then it is ſuppoſed that ſome inconveniencies may reſult from ſuch a determination: but I ſee none; and many inconveniencies might attend a different deciſion. The tenancy from year to year ſucceeded to the old tenancy at will, which was attended with many inconveniencies; and, in order to obviate them, the courts very early raiſed an implied contract for a year, and added, that the tenant could not be removed at the end of the year without receiving ſix months previous notice. And all the inconveniencies which ariſe between the original parties themſelves, and againſt whom the wiſdom of the law has endeavoured to provide, by raiſing the implied contract, exiſt equally in the caſe of their perſonal repreſentatives."

§ 34. A tenant

§ 34. A tenant at will, or from year to year, having acquired the poſſeſſion by the conſent of the owner, there is a privity of eſtate between them. 1 Inſt. 270 *b.*

§ 35. Tenant from year to year, is entitled to half a year's notice to quit, ending at the expiration of the year. Half a year's Notice to quit neceſſary.

§ 36. An agreement, dated in *October* 1769, was made, to let a farm to the defendant, to hold the arable ground from the 13th of *February* then next, the paſture ground from the 5th of *April*, and the meadow ground from the 12th of *May*, for ſeven years from the ſaid days; the tenant to have the privilege of a way-going crop. The defendant occupied the farm, and continued as tenant after the end of the term. Doe v. Snowden, 2 Black. Rep. 1224.

In *September* 1777, the plaintiff gave the defendant a written notice to quit the arable land on the 13th of *February* next, the paſture on the 5th of *April*, and the meadow on the 12th of *May*. The queſtion was, whether this notice was ſufficient.

It was contended on the behalf of the defendant, that this was not a ſufficient notice for any part, the whole being one entire tenancy; and therefore, notice to quit ought to have been given on the 13th of *Auguſt*, being ſix months previous to the time when the firſt part of the term expired.

But, by *Gould*, *Blackſtone*, and *Nares*, Juſtices, (abſent *De Grey* Chief Juſtice), the notice was ſuffi-

cient for the whole. It was ſettled by all the judges about ten years ago, to avoid diverſity of opinions, and for general convenience, that in tenancies from year to year, (which theſe kinds of holding over are held to be), there muſt be ſix months notice on either ſide to quit, according to the antient law; except where any ſpecial agreement, or the cuſtom of particular places, intervene. The true conſtruction of this agreement is, that it is a holding from *Lady Day* to *Lady Day*, old ſtile; the rent being payable at old *Michaelmas* and *Lady Day*. And though part of the farm is to be entered upon and quitted at old *Candlemas*, *February* 13th, and other part not till old *May Day*, *May* 12th, yet that is no more than the cuſtom of moſt countries would have directed, without any ſpecial words for that purpoſe, in a taking from old *Lady Day*, the 5th of *April*, viz. the arable land ſhall be entered upon at *Candlemas*, to prepare it for the *Lent* corn, and the meadows not till *May Day*, when, in thoſe northern countries, they are uſually heyned for hay. And if any inconvenience could have happened to the retiring tenant by this mode of quitting, it is ſufficiently obviated in the preſent caſe, by the clauſe which provides a way-going crop for the tenant. Whereas great miſchief might happen to the landlord, by requiring a notice to be given ſo early as the 13th of *Auguſt*, by giving room to the tenant to haraſs and wear out the land, out of the uſual courſe of huſbandry; and particularly, by taking a ſecond crop of hay from the meadows.

Right v. Derby, 1 Term R. 159.

§ 37. One *Right* being ſeiſed in fee of a houſe at *Saliſbury*, demiſed it to *Derby* by parol, at 10 *l. per annum*

annum from *Midſummer* 1781. On the 26th *March* 1785, *Derby* the tenant was ſerved with a notice to quit on the 29th *September* following.

Lord *Mansfield*.—" When a leaſe is determinable " on a certain event, or at a particular period, no " notice to quit is neceſſary; becauſe both parties are " equally appriſed of the determination of the term. " If there be a leaſe for a year, and, by conſent of " both parties, the tenant continues in poſſeſſion after- " wards, the law implies a tacit renovation of the con- " tract. They are ſuppoſed to have renewed the old " agreement, which was to hold for a year. But then " it is neceſſary, for the ſake of convenience, that if " either party ſhould be inclined to change his mind, " he ſhould give the other half a year's notice before " the expiration of the next or any following year. " Now this is a notice to quit in the middle of the " year, and therefore not binding, as it is contrary to " the agreement."

Buller Juſt.—" It is taken for granted by the counſel " for the plaintiff, that the rule of law, which conſtrues " what was formerly a tenancy at will of lands, into " a tenancy from year to year, does not apply to the " caſe of houſes; but there is no ground for that " diſtinction: the reaſon of it is, that the agreement is " a letting for a year at an annual rent; then, if the " parties conſent to go on after that time, it is a letting " from year to year. This reaſon extends equally to " the preſent caſe: an annual rent is here reſerved, " and, upon ſuch a holding, it has been determined,

" that

" that half a year's notice to quit is neceſſary. This doc-
" trine was laid down as early as in the reign of *Hen.* 8.
" The moment the year begun, the defendant had a
" right to hold to the end of that year; therefore there
" ſhould have been half a year's notice to quit before
Vide Salk. 413. note (b) " the end of that term. This gives riſe to another
" objection in this caſe, upon the diſtinction between
" ſix months and half a year. The caſe in the year-
" book requires half a year's notice, but here there
" is leſs than half a year's notice; and, therefore, it is
" bad on that ground alſo."

Judgment for the defendant.

A Diſtreſs for Rent is a Waiver of a Notice to quit. Ante, f. 24. Zouch v. Willingale, 1 H. Black. Rep. 311. 6 Term. Rep. 219.

§ 38. In the caſe of a tenant at will, we have ſeen that the mere acceptance of rent, after a notice to quit, was not in itſelf a waiver of the notice. But, in a ſubſequent caſe, it was held, that a diſtreſs for rent, upon a tenant from year to year, after notice to quit, was conſidered as a poſitive proof of an intention to waive the notice; as the taking a diſtreſs is an act not to be qualified, and an expreſs confirmation of the tenancy.

TITLE IX.

ESTATE AT WILL AND AT SUFFERANCE.

CHAP. II.

Of an Eſtate at Sufferance.

§ 1. *Deſcription of.*
5. *Half a Year's Notice to quit neceſſary.*
6. *Perſons holding over to pay Double Rent.*
§ 12. *Perſons giving Notice to quit, and after holding over, to pay Double Rent.*
13. *A Parol Notice to quit is within the Statute.*

Section 1.

"A TENANT at ſufferance (ſays Lord *Coke*) is he "that at firſt came in by lawful demiſe, and "after his eſtate ended, continueth in poſſeſſion, and "wrongfully holdeth over." Deſcription of. 1 Inſt. 57 *b.* Carter's Rep. 11. 64.

Thus where tenant *pour auter vie* continues in poſſeſſion after the deceaſe of the *ceſtui que vie*, or tenant for years holds over his term, they become tenants at ſufferance. Id.

So where a perſon makes a leaſe at will, and dies, the eſtate at will is thereby determined; and if the leſſee continues in poſſeſſion, he is tenant at ſufferance. Id.

§ 2. Lord *Coke* ſays, that where a man comes to a particular eſtate by the act of the party, there, if he holds 1 Inſt. 57 *b.* 2 —— 134.

holds over, he is tenant at ſufferance. But where he comes to the particular eſtate by act in law, as if a guardian, after the full age of the heir, continues in poſſeſſion, he is not tenant at ſufferance, but an abator.

1 Inſt. 57 *b.* 2 Leon. 143.

§ 3. No man can be tenant at ſufferance againſt the king, for no laches can be imputed to his majeſty in not entering; and, therefore, if the king's tenant holds over he will be conſidered as an intruder..

1 Inſt. 270 *b.*

§ 4. There is no privity of eſtate between a tenant at ſufferance and the owner of the land; for this tenant only holds by the laches of the owner.

Half a year's Notice to quit neceſſary. 1 Inſt. 270 *b.* n. 1.

§ 5. It appears, from a caſe ſtated by Mr. *Butler*, in his Notes on the firſt Inſtitute, that ſix months notice to quit muſt be given to a tenant at ſufferance.

Perſons holding over to pay Double Value.

§ 6. Tenant at ſufferance was not liable to pay any rent for the lands, becauſe it was the folly of the owner to ſuffer him to continue in the poſſeſſion after the determination of the eſtate. But now, by the ſtatute 4 *Geo.* 2. c. 28. ſ. 1. it is enacted, that, where any tenant holds over, after demand made, and notice in writing given for delivering the poſſeſſion, ſuch perſons, ſo holding over, ſhall pay double the yearly value of the lands, againſt the recovery of which there ſhall be no relief in equity.

§ 7. A receiver,

§ 7. A receiver, appointed by the Court of Chancery, is an agent for the landlord, authorized by this act to give a tenant notice to quit the premiſes. And a notice in writing to quit is of itſelf a ſufficient demand.

§ 8. *Thomas Stanley* made a leaſe to the defendant, *Colley*, on the 25th of *March* 1768, for a year. In conſequence of a ſuit in chancery, *Henry Milton* was appointed receiver of the rents and profits of the premiſes, and with liberty to let and ſet the ſame with the approbation of the maſter. *Henry Milton* ſent a notice in writing ſigned by him to the defendant, to quit the premiſes on the next *Lady-day*. The defendant did not quit the premiſes; and an action was brought againſt him upon the ſtatute 4 *Geo.* 2. for recovering the double value. Wilkinſon v. Colley, 5 Burr. 2694.

It was objected, 1ſt, That this notice was not given by the landlord, nor by any agent of his thereunto lawfully authoriſed: it was given by Mr. *Milton* alone, the receiver under the order of Chancery, without mentioning the landlord at all. But Mr. *Milton* had no authority to turn out the tenants; he was only appointed receiver of the rents and profits with liberty to let and ſet the premiſes with the approbation of the maſter. The order does not empower him to do any thing more than that: he is not, therefore, lawfully authoriſed to give notice for delivering poſſeſſion. And, as this is a penal act, the order of Chancery can give no aſſiſtance towards recovering the penalty. 2dly, A demand was neceſſary as well as notice in writing: the

the words are, " after demand made, and notice in " writing for delivering the poſſeſſion." The demand is independant of the notice. The declaration indeed alleges a demand, but it was not ſufficiently proved. There was no demand made previous to the bringing of the action. The only evidence was, " That a de- " mand was made of the poſſeſſion of the premiſes " after actual ſuing out of the writ." Now, a demand, ſubſequent to the action, is no demand at all. As the notice was, to quit the poſſeſſion at a fixed time, ſomebody ought to have attended to receive it.

The court, however, were unanimouſly of opinion, that the receiver was agent for the landlord lawfully authoriſed for this purpoſe; and that the notice in writing was of itſelf a ſufficient demand. They held this to be a remedial law, as the penalty was given to the party aggrieved.

§ 9. A notice to quit, under the ſtatute 4 *Geo.* 2. may be given previous to the expiration of the leaſe.

Cutting v. Derby, 2 Bla. R. 1075.

§ 10. Lands were leaſed from the 10th of *October* 1763, for eleven years. The perſon entitled to the reverſion gave a written notice to the tenant on the 30th *September* 1773, to quit the lands at the expiration of the term, which was the 10th *October* 1774; and again repeated the like notice on the 7th *October* 1774, or to pay double value. On the 10th *October* 1774, the reverſioner went on the premiſes and demanded poſſeſſion, which was refuſed. And again, he turned a ſcore of lambs

lambs on the premiſes, which the tenant turned off the next day; and held the lands another year. In an action for double yearly value, the jury gave a verdict for the plaintiff. A motion was made for a new trial; becauſe, 1ſt, by the ſtatute, notice to quit muſt be given after, and not before the expiration of the term. 2dly, The leaſe did not expire till midnight, and poſſeſſion was demanded in the preceding afternoon.

De Grey Ch. Juſt.—I am ſatisfied that the notice to quit may be previous to the expiration of the term. It prevents ſurpriſe, and is moſt for the benefit of both landlord and tenant. The only objection to it is, the order in which the words ſtand in the act of parliament; which weighs little againſt the ſenſe and convenience of the other conſtruction. The ſecond objection is, that the notice to quit and demand of poſſeſſion are on the 10th of *October*, whereas the leaſe did not expire till the 11th. At the utmoſt, the leaſe expired and the tenant ought to quit the minute after midnight. If ſo, the difference is trifling, and not to be attended to in a motion for a new trial, which ought always to be founded on the true juſtice of the caſe, which is with the plaintiff, and not on little quirks and niceties.

Gould Juſt.—This is a remedial law, and to be liberally conſtrued. I think the notice to quit ought to be *before* the time, in order to prepare the tenant. As to the other point, I incline to think the leaſe expired on the 10th at ſunſet.

Blackſtone

Blackſtone Juſt.—Notice or requiſition to the tenant to quit at the end of his term, implies that it muſt be previous. It would be abſurd, becauſe impoſſible to be complied with, to require, *after* the expiration of the term, that the tenant ſhould quit at the expiration. The ſtatutes of 4 *Geo.* 2. c. 28. and 11 *Geo.* 2. c. 19. being *in pari materia*, ought to have the ſame conſtruction; and where (by the latter) the tenant is to be bound by his own notice to quit, that muſt be clearly previous. As to the ſecond point, I doubt, that though the rent is demandable at ſunſet, yet it is not due, nor does the leaſe expire till midnight. If ſo, the notice is a little premature: but this is only the fraction of a ſecond; and the court will not grant a new trial on ſuch a frivolous objection.

Infra, f. 12.

Cowp. Rep. 245.

§ 11. Although a landlord, after bringing an ejectment, and after the time laid in the demiſe, ſhould agree to accept the ſingle inſtead of the double rent, to which, by this ſtatute, he is entitled; yet he will not be thereby precluded from recovering in the ejectment.

Perſons giving Notice to quit, and after holding over, to pay Double Rent.

§ 12. By the ſtatute 11 *Geo.* 2. c. 19. ſ. 18. reciting that great inconveniencies had happened to landlords whoſe tenants have power to determine their leaſes by giving notice to quit, and yet refuſing to deliver up the poſſeſſion, when the landlord hath agreed with another tenant for the ſame, it is enacted, that if any tenant ſhall give notice of his intention to quit the premiſes, and ſhall not deliver up the poſſeſſion at the time

time mentioned in ſuch notice, he ſhall thenceforth pay double the rent which he ſhould otherwiſe have paid; and ſuch double rent ſhall continue to be paid during all the time ſuch tenant ſhall continue in poſſeſſion.

A Parol Notice is within the Statute.

§ 13. A parol notice to quit, by a tenant holding from year to year under a parol leaſe, is within this ſtatute, and ſubjects the tenant to the payment of double rent.

Timmins v. Rowlinſon, 1 Bla. R. 533. 3 Burr. 1607.

§ 14. A tenant, holding under a demiſe by parol for one year, from the 5th *April* 1760, and ſo from year to year, gave notice, by parol, that he would quit on the 5th *April* 1761, but held over until the 10th of *October* following. Two queſtions were made in this caſe: 1ſt, Whether the plaintiff was liable to pay double rent for not quitting after giving a parol notice? 2dly, Whether, as plaintiff held under a parol demiſe, as tenant from year to year, this was a holding under the ſtatute 11 *Geo.* 2. ſo as to ſubject the plaintiff to double rent for not quitting after notice.

Lord *Mansfield.*—Statutes *in pari materia* are to be all taken as one ſyſtem to ſuppreſs the miſchief. The miſchief is an act of vexation, and inconvenience, and injuſtice by the tenant—after notice given by himſelf—after the landlord has another ready—to ſtop ſhort and ſay, "I won't quit." This is an univerſal ſort of holding; and, therefore, this practice might be a very extenſive evil. The legiſlature, in 4 *Geo.* 2.,

made a proviſion where the landlord gives notice; and afterwards, in 11 *Geo.* 2., this additional proviſion, in caſe the notice comes from the tenant. The two laws are only parts of the ſame proviſion. This caſe is ſaid to be not within the words, *where tenants have power to determine.* Why ſo? There are two ſorts of powers, one ariſing by ſpecial compact, which this is not, the other by conſtruction of law, as in the preſent caſe of parol leaſes for a year. But, 2dly, it is ſaid that the notice muſt be in writing. Why? Does the act ſay ſo? No; but the act 4 *Geo.* 2. does. That is the ſtrongeſt reaſon againſt it—It is here purpoſely omitted—The drawer of this act could not leave it out by accident, having the other act before him. As to the words *mentioned and compriſed*; may not that be done in a parol notice? Certainly it may. I therefore think this is a caſe within the miſchief, the preamble and the enacting words of the ſtatute 11 *Geo.* 2.

Wilmot Juſt.—Same opinion. As to the notice being in writing, the different penning of the act furniſhes evidence of different intentions. The 4 *Geo.* 2. reſpects, in my opinion, chiefly leaſes for lives or for long terms of years; and if the tenant holds over, and the landlord gives notice for him in writing to quit, he ſhall recover not double rent (which would be frequently trifling) but double value. There are two good reaſons why one ſhould be in writing, and the other not: 1ſt, If the tenant gives ſuch notice as will juſtify his leaving the farm, and does not leave it, that is the miſchief which the act meant to meet; and

parol

parol notice is ſufficient for that. 2dly, Landlords can uſually write, and tenants cannot; therefore, the landlord's notice is to be in writing, the tenant's not. This caſe is within the preamble and the enacting words; but had the preamble been confined, I ſhould have been for extending the remedy according to the enacting words. Theſe tenancies are the moſt uſual of any. It has almoſt extinguiſhed tenancies at will, which was a moſt unreaſonable and inconvenient tenure to both parties. Then came tenancies for a year certain, which were better, but ſtill inconvenient: to turn out or quit at the end of a year without notice. This produced the preſent rule, that landlords and tenants ſhould mutually give reaſonable notice to quit; and, therefore, if the landlord brings ejectment, it is always required that he ſhew he hath given reaſonable notice. What is reaſonable is matter of circumſtance. This brings the preſent caſe within the words of the act.

They have power to quit and determine upon giving reaſonable notice.

TITLE X.

COPYHOLD.

CHAP. I.
Of the Origin and Nature of Copyholds.

CHAP. II.
Of Copyhold Grants.

CHAP. III.
Of the Incidents to Copyholds.

CHAP. IV.
Of Fines and Heriots.

CHAP. V.
Of the Forfeiture of Copyholds.

CHAP. VI.
Of the Extinguiſhment and Suſpenſion of Copyholds.

CHAP. I.

Of the Origin and Nature of Copyholds.

1. *Origin of Copyholds.*
8. *Deſcription of a Copyhold.*
10. *Of Free Copyholds.*
17. *Copyholders have a legal Intereſt.*
21. *Circumſtances neceſſary to a Copyhold.*
22. *A Manor.*
26. *A Court.*
33. *The Lands muſt be parcel of the Manor.*
34. *And demiſed or demiſable.*
41. *What deſtroys the Cuſtom of granting Copyholds.*
49. *What may be granted by Copy.*
53. *What Intereſt a Copyholder may have.*
55. *Of Copyhold Cuſtoms.*
61. *Of Copyhold Juriſdictions.*

Section

Section 1.

IT has been ſhewn, that where a conſiderable tract of land was granted to a perſon of rank, to hold by a feudal tenure, the grantee uſually reſerved a part for the maintenance of himſelf and his family, which was called *demeſne land*; and granted the freehold of the remainder to his retainers, to be held of him, by military or other free ſervices, and this was called a *ſeignory*, *lordſhip*, or *manor*.

Origin of Copyholds. Vide Tit. 1. f. 5.

§ 2. The demeſne land was cultivated by the lord's villeins, who were in a condition of downright ſervitude, and obliged to perform whatever ſervice was commanded them by their lord. They were, however, allowed to occupy ſome ſmall part of thoſe demeſnes to enable them to provide for their own ſubſiſtence. The tenure by which they held ſuch lands, was that of pure villenage; the ſervices were baſe and uncertain; and, as they might be diſpoſſeſſed at any time, they were ſaid to hold at the mere will of the lord.

Black. Tra. 211.

§ 3. The acquieſcence of lords of manors to their villeins holding their lands as long as they performed their ſervices, and in permitting their children to ſucceed to them, advanced the pretenſions of the villeins, in oppoſition to the abſolute rights of the lords, ſo as to give them a kind of preſcriptive or cuſtomary right to their poſſeſſions; which, in courſe of time, was taken notice of by the courts of juſtice, and, under

their ſanction, became at length a part of the common law.

Lit. ſ. 75. § 4. As tenants of this ſort had no other title to their eſtate but theſe cuſtoms, and admiſſions in purſuance of them, entered on the rolls of the lord's cuſtomary court, or the copies of ſuch entries witneſſed by the ſteward, they were called *tenants by copy of court roll*, and their tenure itſelf a *copyhold*, or *cuſtomary eſtate*.

§ 5. The firſt mention of tenant by copy of court roll is in the latter end of the reign of *Edw.* 3. But it is not deſcribed in the book of old tenures, nor does any diſcuſſion appear upon this title in that reign.

ſ. 73. § 6. "Tenant by copy of court roll (ſays *Littleton*) "is, as if a man be ſeiſed of a manor, within which "manor there is a cuſtom, which hath been made time "out of mind of man, that certain tenants within the "ſame manor have uſed to have lands and tenements "to hold to them and their heirs in fee-ſimple, or fee "tail, or for term of life, *&c.* at the will of the lord, "according to the cuſtom of the ſame manor."

§ 7. When the ſtatute 12 *Cha.* 2. ſ. 24. aboliſhed tenures by knights ſervice, and reduced them to free and common ſocage, it was provided, by the 7th ſection, that it ſhould not alter or change any tenure by copy of court roll, or any ſervices incident thereunto.

§ 8. A copyhold

§ 8. A copyhold eſtate may therefore be deſcribed to be a part of the demeſnes of a manor, held at the will of the lord, according to the cuſtom of the manor; by a grant from the lord, and an admittance of the tenant, entered on the rolls of the manor court. Deſcription of a Copyhold.

§ 9. In ſome manors, copyholders are called tenants *per le verge*; becauſe, when their lands were to be ſurrendered, the tenant uſe to have a little verge or rod in his hand, which he delivered to the ſteward, who delivered it to the ſurrenderee, in the name of ſeiſin. Lit. f. 78.

§ 10. There is another ſpecies of copyhold tenure, which was formerly called *privileged villenage* or *villein ſocage*: of the origin of which *Bracton* gives the following account.—"There were, at the time of the conqueſt, certain freemen who held their reſpective tenements freely, by free ſervices or by free cuſtoms; and, being firſt ejected by the hand of power, they afterwards returned and took their own tenements again, to be held in villenage, doing therefore ſervices that were baſe and ſervile, but certain, and expreſſed by name. Theſe are called *aſcriptitious to the ſoil*, and yet are freemen, though they perform villein ſervices; ſince they perform them, not in reſpect of their perſons, but in reſpect of their tenures." Of Free Copyholds. Black. Tra. 213.

§ 11. Tenants of this kind hold by copy of court roll, as well as mere copyholders; their admittance,

however, is not at the will of the lord, but according to the cuſtom of the manor; from whence they are called *Free Copyholders*, or *Cuſtomary Freeholders*.

Crowther v. Oldfield, 1 Salk. 365.

§ 12. The great difference between copyholds and cuſtomary freeholds, which paſs by ſurrender, is, that the copyholder is in by the demiſe of the lord: but, in the caſe of a cuſtomary freehold, the lord is only an inſtrument; and that, in pleading a title to a copyhold eſtate, it is ſufficient to ſhew a grant from the lord. But in cuſtomary freeholds, the eſtate of the ſurrenderor muſt be ſhewn, as that the ſurrenderor was ſeiſed in fee, and ſurrendered to the lord, and he granted, &c.

Blac. Tra. 317.

§ 13. Moſt of the manors in which this kind of tenure is to be found, are manors of ancient demeſne, *antiquum dominicum regis*; that is, thoſe manors which (though now granted out to private ſubjects), were actually in the hands of the Crown, in the reign of *Edward* the Confeſſor, and at the Conqueſt, and ſo appear to have been by domeſday book.

Smith v. Page, Cumb. R. 387. 2 Vent. 143. 3 Salk. 100. Hughs v. Harrys, Cro. Car. 229. Gale v. Noble, Carth. 432. 1 Salk. 365. Anon. 11 Mod. 53. 3 Burr. R. 1273.

§ 14. Whatever may paſs by deed without ſurrender, though it be required that the deed be inrolled in the lord's court, can be no copyhold; and whatever may paſs by ſurrender in the lord's court, according to the cuſtom of the manor, but not according to the will of the lord, is not a mere copyhold, but a cuſtomary freehold.

§ 15. In

§ 15. In Lord *Hale's* notes on the firſt *Inſtitute*, publiſhed by Mr. *Hargrave*, 58 *a. n.* 1., is the following obſervation: "*Nota*, theſe words *ad voluntatem domini*, are material to expreſs copyhold; for, if theſe words be omitted in pleading, it ſhall be intended that the eſtate is a cuſtomary freehold."

§ 16. Sir *William Blackſtone*, in his conſiderations on copyholders, concludes with obſerving, that, however the lawyers may, at times, have denominated theſe tenures a baſe ſpecies of freehold, in contradiſtinction to mere copyholds, yet the law, in the main, regards them as being properly copyhold, and not freehold tenures; elſe they would not have ſubſiſted to this day: for they muſt otherwiſe have been involved in the general fate of the reſt of our antient tenures, when, by the ſtatute 12 *Cha.* 2. c. 24., they were all aboliſhed and reduced to free and common ſocage, except only tenures in frankalmoign, and tenures by copy of court roll.

Copyholders have a legal Intereſt.

§ 17. The tenure of copyhold was originally deemed to be ſo precarious, that an opinion was held, even ſo late as the reign of *Edward* 4., that, if the lord ſhould ouſt his copyholder, he had no other remedy but to ſue the lord by petition. It was, however, laid down by Sir *Robert Danby*, Chief Juſtice of the Common Pleas, in 7 *Edw.* 4., and afterwards by Sir *Thomas Bryan*, his ſucceſſor, that a copyholder, obſerving the cuſtoms of the manor, and performing his ſervices, ſhould, if put out by his lord, have an action of treſpaſs againſt him. A doctrine which has been long ſince

Lit. ſ. 77.

1 Inſt. 60 *b*.

ſince eſtabliſhed; for, as Lord *Coke* ſays, "Albeit he "is *tenens ad voluntatem domini*, yet it is *ſecundum con-* "*ſuetudinem manerii.*"

§ 18. Copyhold eſtates are, however, ſtill ſaid to be held at the will of the lord; and this poſition is ſo far true, that the freehold of all lands which are held by copy of court roll, is veſted in the lord; and the tenant's eſtate is not ſo great as an eſtate for years. The will of the lord is not, however, now arbitrary, as it originally was, but muſt be conformable to the cuſtoms of the manor: and therefore a copyholder
Lit. ſ. 82. may, as far as the cuſtom warrants, have any of the eſtates or quantities of intereſt, which may be had in other lands.

§ 19. Copyhold eſtates are, in general, granted to a man and his heirs, or the heirs of his body. But there are many manors, particularly in the northern parts of the kingdom, where the cuſtom is, to grant copyholds for one, two, or three lives *ſucceſſivè*: and, in ſome of thoſe manors, the cuſtom gives the copyholder a right to a renewal of the grant, upon the falling of the lives.

Grafton v. Horton, 2 Bro. Parl. Ca. 284. Abergavenny v. Thomas, 3 Anſtr. R. 668. Wharton v. King. 3 Anſtr. R. 659.

§ 20. A cuſtom, that the heir of a copyholder for lives is entitled to have a new copy, on payment of a reaſonable fine, is void, on account of the difficulty of aſcertaining the quantum of ſuch a fine. But a cuſtom, that the heir ſhall have a new copy, upon payment of a fine certain, is good. The only proof that can be given of ſuch a cuſtom, is, the fact of renewals having

having taken place according to ſome certain ſtandard, that is upon a fine certain.

Circumſtances neceſſary to a Copyhold.

§ 21. There are four circumſtances neceſſary to the exiſtence of a copyhold eſtate: 1ſt, A manor; 2d, A court; 3d, The lands muſt be parcel of, and ſituated within the manor of which they are held; 4th, The lands muſt have been demiſed, or demiſable, by copy of court roll, from time immemorial.

A Manor.

§ 22. With reſpect to a manor, it is eſſentially neceſſary; for a copyhold eſtate is part of the demeſnes of a manor, and held of the lord of ſuch manor; ſo that, without a manor, there can be no copyhold.

6 Rep. 64 *a.*

§ 23. A manor may be ſubdivided, and the ſubdiviſions may ſeparately retain manerial rights. Thus, if a partition be made of a manor between two coparceners, and each has parcel of the demeſnes and parcel of the ſervices, as each of them is in by act of law, each of them has a manor. But, if a perſon having a manor, grants part of the demeſnes, and part of the ſervices to another, the grantee ſhall not have a manor.

Bragg's caſe, Godb. 135.

§ 24. In conſequence of this doctrine, it has been held, that a tenant in dower of a third part of a manor, has a manor, and may hold courts, and grant copyholds.

§ 25. Although the demeſnes of a manor ſhould be ſevered from the ſervices, or the ſervices extinct, by which

Tit. 1. f. 11. which the manor is, ſtrictly ſpeaking, deſtroyed; yet it will continue to be a manor, ſo far as is neceſſary to ſupport the copyhold eſtates which are held of it.

Gilb. Ten. 209.

A Court.

§ 26. As to a court, it is equally neceſſary, the tenant having no other evidence of his title but the rolls of that court. There are, however, two kinds of courts incident to a manor; a court baron, or freeholders court, and a cuſtomary court, which only relates to the cuſtomary tenants or copyholders; in which, the lord or his ſteward is judge. And although there ſhould be no freeholders in the manor, by which the court baron, and even the manor itſelf, is, in ſome reſpects, loſt, yet there ſtill may be a cuſtomary court. For as theſe two courts are diſtinct from one another, in every reſpect, the want of freeholders ought not to prevent the lord from holding a cuſtomary court for his copyholders.

1 Inſt. 58 *a.* 4 Rep. 26 *b.* Gilb. Ten. 210.

Melwich v. Luther, 4 Rep. 26 *a.* Cro. Eliz. 102.

§ 27. It was reſolved, in 30 *Eliz.*, that, when the lord of a manor having many antient copyholds in one town, grants the inheritance of all the copyholds to another, the grantee may hold a court for the copyhold tenements: for, although it is not a manor in law, becauſe it wants free tenants, yet, as to the copyhold tenants, the grantee has ſuch a manor, that he may hold a court to make admittances and grants of the copyhold tenements.

Vide Gilb. Ten. 210.

Neale v. Jackſon, 4 Rep. 26 *b.* Cro. Eliz. 395.

§ 28. It was reſolved, in 37 *Eliz.* that where the lord of a manor demiſed all his lands, granted by copy, to

to another for 2000 years, ſuch leſſee might hold a court for the copyholds.

§ 29. If a woman be endowed of ſeveral copyhold tenements, ſhe may hold a court and grant copies, though the ſervices of any of the freeholders were not allotted to her, but only the demeſnes and the copyhold tenements; for though ſhe having, no ſervices, cannot hold a court baron, yet ſhe may have a ſpecial court for this purpoſe, and it is good enough. Gay v. Kay, Cro. Eliz. 661.

§ 30. A grant of the freehold of one copyhold will not enable the grantee to hold a cuſtomary court. The copyhold will not, however, be totally deſtroyed by this grant: but the copyholder will be excuſed from all thoſe ſervices that ariſe by reaſon of the cuſtomary court. Murrell v. Smith, 4 Rep. 24 *b*. Cro. Eliz. 252.

§ 31. Lord *Coke* ſays, that the court baron muſt be held on ſome part of the manor. But it is ſaid that a court for admitting copyholders, where no pleas are holden, may be held out of the precincts of the manor. 1 Inſt. 58 *a*. 1 Leon. 289.

§ 32. Tenant by copy has an intereſt in the court rolls, as well as the lord; becauſe they are the only evidence of his title, and the lord cannot deny him a ſight or copy of a court roll, to make ſuch uſe of it as the tenant may think proper. If he does, an attachment will lie againſt him. 11 Mod. 111.

§ 33. The

The Lands, &c. muſt be Parcel of the Manor.

1 Inſt. 58 *b.*

Ante, f. 27.

§ 33. The third circumſtance neceſſary to the exiſtence of a copyhold, is, that the land be parcel of the manor whereof it is held. It is not, however, abſolutely neceſſary, that the lands ſhould continue to be parcel of the manor, as it has been ſtated, that where a lord granted the inheritance of all his copyholds, whereby the lands were ſevered from the manor, yet the copyhold ſtill ſubſiſted.

And demiſed or demiſable.

1 Inſt. 58 *b.*

§ 34. The fourth circumſtance neceſſary to the exiſtence of a copyhold eſtate, is, that the lands have been demiſed, or demiſable by copy of court roll, for time immemorial. For this tenure derives its whole force from cuſtom, ſo that no new copyhold can be created at this day; that is, no land can be granted now as copyhold, which was not granted or grantable as copyhold before.

Kemp v. Carter, 1 Leon. 55.

§ 35. Upon iſſue, whether the lord of a manor had granted certain lands by copy of court roll, according to the cuſtom of the manor; it was given in evidence, that within the ſaid manor were divers cuſtomary lands, and that the lord now, of late, at his court, had granted the lands in queſtion by copy, but they had never been granted by copy before. The court held, that the jury were bound to find *dominus non conceſſit*, for notwithſtanding that *de facto, dominus conceſſit per copiam*, yet *non conceſſit ſecundum conſuetudinem manerii*, &c. For the ſaid land was not cuſtomary, nor was it demiſable, as the cuſtom had not taken hold of it.

§ 36. Though

§ 36. Though lands ſhould appear to have been granted by copy of court roll for ſixty years, yet, if there has been an interruption in that mode of granting them, they will not be deemed copyholds.

§ 37. The Biſhop of *Norwich* being ſeiſed of the manor of *N. jure eccleſiæ*, in 10 *Hen.* 8., granted parcel of the demeſnes of the ſaid manor to one *T.* and his heirs, by copy. Theſe lands had never been granted by copy before; but were held in this manner until 23 *Hen.* 8., when *T.* committed a forfeiture, and the biſhop ſeiſed the land, but regranted it to him immediately by copy, by which it was again held until 8 *Eliz.* The court determined, that 50 years continuance was requiſite to faſten a cuſtomary condition upon the land againſt the lord; and though the original commencement of the grant by copy was in 11 *Hen.* 8., from which, to 8 *Eliz.*, was more than 60 years, yet that the ſeizure for a forfeiture, which happened 23 *Hen.* 8., interrupted the continuance of the time which might by law have perfected the cuſtomary intereſt; ſo that the commencement of the copyhold was to be reckoned from 23 *Hen.* 8., which not being ſufficient time to make good a cuſtom, the lord might enter on the copyholder as upon his tenant at will.

Taverner and Cromwell's caſe, 3 Leon. 137.

§ 38. Where lands which have, for time immemorial, been demiſed by copy, come to the lord by forfeiture or eſcheat, they may again be granted out by copy, although the lord ſhould keep them in his hands for many years; for they were always demiſable.

1 Inſt. 58 *b.*

§ 39. It

Harris v. Jay, 4 Rep. 30 *a.* Cro. Eliz. 699.

§ 39. It was reſolved, in 41 *Eliz.*, that where a copyholder of the queen's manor was attainted of felony, by which his copyhold eſcheated, the queen's ſteward of the manor might grant it out as copyhold *ex officio*, without any warrant.

Read, 55.

Vide f. 38.

Epis. London v. Rowe, 3 Keb. 124. Sel. Ca. in Ch. 62.

§ 40. If a copyholder ſurrenders his copyhold into the lord's hands, merely to the uſe of the lord, *Calthorpe* doubts whether the lord may grant this land again by copy, as he may where it comes to him by forfeiture or eſcheat. Becauſe it becomes parcel of the demeſnes by his own acceptance. And it ſeems doubtful, whether the lord of a manor can grant the waſte by copy.

What deſtroys the Cuſtom of granting Copyholds.

French's caſe, 4 Rep. 31 *a.*

§ 41. But where lands which were formerly demiſed by copy, are granted out by the perſon entitled to the inheritance for any eſtate of freehold, or for years, this will deſtroy the cuſtom of demiſing them by copy; becauſe, while the lands were granted for life, or years, they were neither demiſed nor demiſable by copy. So, if the lord makes a feoffment in fee thereof upon condition, and afterwards enters for the condition broken, the lands can never be regranted by copy.

Id.

§ 42. If copyholds forfeited or eſcheated to the lord, are extended upon a ſtatute or recognizance, acknowledged by the lord, or if they are aſſigned to the lord's wife for her dower, although theſe impediments are by acts of law, yet, as the cuſtom of demiſing is interrupted by a lawful act, the lands can never after be granted by copy.

§ 43. Where

§ 43. Where copyhold lands which have fallen in to the lord are leaſed together with the manor, this will not deſtroy the cuſtom of granting thoſe lands again by copy.

§ 44. It was held by the Court of King's Bench, on a trial at bar, 14 *Car.* 1., that if a copyholder in fee ſurrenders to the lord of the manor his copyhold eſtate, and the lord makes a leaſe for years of the manor, and of the ſaid copyhold, by the name of his tenement called *H.*, that it was not a determination of the copyhold: becauſe, when the lord let the manor, it was included as a parcel of the manor. But if the lord, though he had been but *dominus pro tempore*, had made a leaſe for years of the copyhold, by itſelf, that had deſtroyed the copyhold; for it was then during that time ſevered from the manor, and ſo could never afterwards be demiſable by copy. But the manor being demiſed, includes the copyhold as parcel of the manor; and the naming of the copyhold is ſurpluſage; and it remains always as parcel of the manor, and demiſable by copy as it was before.

Lee v. Boothby, Cro. Car. 521.

§ 45. No perſon can deſtroy the cuſtom of granting land by copy, unleſs he is entitled to the fee-ſimple of the manor. Thus, if a perſon who is only tenant in tail, or for life, of a manor, makes a leaſe for years of a copyhold, which has eſcheated, though *quoad* himſelf the cuſtom of demiſing is thereby deſtroyed; yet *quoad* the iſſue in tail, or the reverſioner, the cuſtom is not deſtroyed. So it is in the caſe of a huſband ſeiſed in right of his wife.

1 Inſt. 58 *b.* n. 7. Comſbie v. Ruſhy, Cro. Eliz. 459.

§ 46. A tortious interruption of the eſtate, as if the lord is diſſeiſed, and the diſſeiſor dies ſeiſed; or, if the land is recovered againſt the lord, by falſe verdict, or erroneous judgment, will not deſtroy the cuſtom of demiſing by copy; although, in theſe caſes, the land was not demiſed or demiſable during the interruption.

4 Rep. 31 *a.*

Roe v. Newman, 2 Wilſ. Rep. 125.

§ 47. It was reſolved, in a modern caſe, that copyhold land muſt be ſtated, or found or pleaded, to have been demiſed, or demiſable, by copy of court roll, for time out of mind, otherwiſe a court cannot adjudge it to be copyhold.

Revel v. Jodrell, 2 Term R. 415.

§ 48. King *Charles* 1. granted to *Edward Titchfield* and others, and their heirs, the manors of *Duffield* and *Belper*, with all their rights, &c. except the foreſts, chaſes, and parks, &c. There were ſeveral copyhold eſtates held of this manor; and the copyholders had rights of common on theſe waſtes. It was agreed between the crown and theſe copyholders, that the crown ſhould have one-third of theſe waſtes in ſeveralty, and the commoners ſhould have the other two-thirds; in conſequence of which, the ſoil of two-thirds was granted by the crown to certain perſons and their heirs, for the uſe and benefit of the commoners and their heirs and aſſigns in fee farm and free ſocage. It was reſolved, that by the original grant, the waſtes were ſevered from the manor; and that, in conſequence of the grant to truſtees in truſt for the commoners, theſe waſtes became freehold.

§ 49. With

§ 49. With reſpect to the things which may be granted by copy of court roll, they muſt be parcel of the manor, and lie in tenure; or elſe be appendant to ſomething that does lie in tenure. What may be granted by Copy. 1 Inſt. 58 *b.*

§ 50. Underwood growing upon a part of the manor, may be granted by copy, becauſe it is a thing of perpetuity, to which cuſtom may extend; for after every felling, the underwood grows again. So herbage, or any profit of a parcel of the manor, may be granted by copy. Hoe v. Taylor, 4 Rep. 30 *b.*

§ 51. It is ſaid by Lord *Coke*, that a cuſtomary manor may be granted by copy. And Lord Chief Baron *Gilbert* ſays, that the grantee may grant copyholds, but it muſt be of ſuch things as have been uſually demiſed by him; for it ſeems he cannot grant all his demeſnes without they have been uſually demiſed. 1 Inſt. 58 *b.* Nevill's caſe, 11 Rep. 17. Ten. 215.

§ 52. It is ſaid in *Roll*'s *Ab.* 498., that tythes may be granted by copy of court roll, for they may be parcel of a manor. Sands v. Drury.

In *Croke*'s report of this caſe, *Popham* is ſaid to have been of opinion that they were not grantable by copy, becauſe a manor and tythes are of ſeveral natures, and ſo impoſſible, that that which is not parcel of the manor, can be demiſed according to the cuſtom of the manor. But *Gawdy* doubted, and conceived, it had been well enough if it had been ſo uſed time out of mind. Cro. Eliz. 814. S. C. Vide Co. Cop. Sup. f. 17. Gilb. Ten. 331.

What Intereſt a Copyholder may have.

§ 53. With reſpect to the quantity of intereſt which a copyholder may have in his eſtate, it has been ſtated, that copyholds may be granted in fee-ſimple; and, conſequently, any leſſer eſtates may be granted to be held by this tenure.

Co. Cop. f. 56.

§ 54. Lord *Coke* ſays, that if a copyhold be granted to a perſon for the life of another, and the grantee dies, living *ceſtui qui vie*, a ſtranger may enter as a general occupant. It has, however, been laid down by Lord *Holt*, that there cannot be an occupant of a copyhold, becauſe of the prejudice it might be to the lord; and, therefore, if a copyholder holding for the life of another die, the lord ſhall enter; but there may be a ſpecial occupant of a copyhold.

2 Ld. Raym. 1001.
1 Salk. 188.
1 Roll. Ab. 511.
Gilb. Ten. 326.

Of Copyhold Cuſtoms.

§ 55. As eſtates held by copy of court roll, owe their exiſtence to immemorial cuſtom and uſage, ſo the rules by which they are governed, derive their effect from the ſame ſource. Hence Lord *Coke* obſerves, that what a copyholder may or ought to do, or not do, the cuſtom of the manor muſt direct: for *conſuetudo manerii eſt obſervanda.* And many of thoſe cuſtoms are materially different from the rules of the common law.

1 Inſt. 63 *a.*

Cro. Eliz. 353.

§ 56. Copyhold cuſtoms differ from thoſe which relate to freeholds, in this circumſtance, that cuſtoms relating to freeholds muſt be at leaſt ſo general as to extend throughout a county, and cannot prevail in a particular place only: whereas, a cuſtom relating to

copyholds is good in a particular place; for *de minimis non curat lex*; and the law is not altered thereby.

§ 57. Lord *Coke* has laid it down, that there are two pillars of cuſtom; one the common uſage, the other, that it be time out of mind; and therefore, the perſon who maintains a cuſtom, muſt ſhew precedents in the court rolls to prove the uſage; and that, without ſuch proof, and that it had been put in uſe, (although it had been deemed and reputed to have been the true cuſtom), yet a court could not give credit to the proof by witneſſes. 4 Leon. 242.

§ 58. There are two ſorts of copyhold cuſtoms: Firſt, General cuſtoms, which extend to all manors in which there are copyholders, and are warranted by the common law, of which the courts take notice: Secondly, Particular cuſtoms prevailing only in ſome manors, which muſt be ſpecially pleaded. 9 Rep. 75 *b.* 1 Salk. 184.

§ 59. Particular cuſtoms are conſtrued ſtrictly, and, where they are contrary to reaſon, morality, or juſtice, or where they are not capable of being reduced to a certainty, the courts of law will pay no attention to them. It ſhould, however, be obſerved, that the unreaſonableneſs of a cuſtom is not altogether to be deduced from the rules and maxims of the common law, for there is no particular cuſtom that does not, in ſome reſpects, contradict the common law.

2 Atk. R. 189. 2 Stra. 957.

§ 60. Evidence of cuſtoms in a neighbouring manor, ſhall not, in general, be admitted to ſhew the cuſtom of another manor; becauſe every manor is governed by its own cuſtoms.

Of Copyhold Juriſdictions. Lit. ſ. 76.

§ 61. Copyhold eſtates being derived from the tenure in villenage, were not originally within the juriſdiction of the king's courts at *Weſtminſter*; ſo that copyholders muſt implead, and be impleaded, in the land's cuſtomary court, by plaint or bill to the lord.

Black. Tra. 213.

§ 62. Free copyholders are alſo incapable of ſuing or being ſued in the uſual real actions. But they have a peculiar method of proceſs, called *a Writ of Right Cloſe.*

Co. Cop. ſ. 51.

§ 63. If, therefore, a copyholder be ouſted by a ſtranger, he cannot implead him by the king's writ: but muſt proceed by plaint in the lord's court, and ſhall make proteſtation to proſecute the ſuit in the nature of an aſſiſe of novel diſſeiſin, or in the nature of any other writ, as his cauſe ſhall require.

Id.

§ 64. If a copyholder be ouſted by the lord, he cannot maintain an aſſiſe at the common law, becauſe he has no freehold; but he may have an action of treſpaſs againſt him; for it is againſt reaſon that the lord ſhould be judge where he is a party.

§ 65. Where

§ 65. Where a copyholder makes a leaſe warranted by the cuſtom, and his leſſee is ejected, he ſhall not ſue in the lord's court by plaint, but may bring an ejectment at common law; for he does not demand a cuſtomary eſtate, but an eſtate warranted by the rules of the common law. Id. 4 Rep. 26 *a*

§ 66. The Court of Chancery has aſſumed a juriſdiction over copyholds, upon the principle, that equity will not ſuffer a right to be without a remedy; and, therefore, if an erroneous judgment be given in a copyhold court, in a formedon, or any other kind of action, a bill may be exhibited in chancery for its reverſal. Max. of Eq. Max. 6. 1 P. Wms. 330.

§ 67. A court of equity will alſo compel the lord of a manor to admit a copyholder, and to hold a court for that purpoſe. For, as an action on the caſe will not lie againſt the lord, there is no other remedy. Cro. Jac. 368.

§ 68. The Court of Chancery alſo exerciſes a juriſdiction over copyholds, in moderating the rigour of cuſtoms, and relieving againſt exceſſive fines and unreaſonable forfeitures; of which, an account will be given in the ſubſequent chapters.

§ 69. Where a doubt ariſes reſpecting the cuſtoms of a manor, the Court of Chancery will direct an iſſue to try what the cuſtoms of the manor really are. But the court is not bound to ſend a cuſtom to be *tried*, which, *prima facie*, is void at law. Fawcet v. Lowther, 2 Veſ. 300.

Rep. Temp. Finch. 114. Rous v. Barker, Dom. Proc. 1725. D. of Leeds v. E. of Strafford, 4 Veſ. jun. 180.

§ 70. The Court of Chancery will grant a commiſſion to examine witneſſes for the purpoſe of aſcertaining the cuſtoms of a manor, and alſo, to ſet out the boundaries of copyhold eſtates, where they are intermixed with freeholds.

TITLE

TITLE X.

COPYHOLD.

CHAP. II.

Of Copyhold Grants.

§ 1. *Nature of Copyhold Grants.*
3. *Neceſſity of Admittance.*
4. *All Lords of a Manor may make Grants.*
11. *Provided they have a lawful Eſtate.*
13. *A Steward may make Grants.*
17. *To whom Grants of Copyholds may be made.*
18. *The Cuſtoms of the Manor muſt be purſued.*
26. *Copyhold Grants take place of many other Eſtates.*

Section 1.

Nature of Copyhold Grants.

IT has been ſhown, that copyhold eſtates are derived from a voluntary grant by the lord to the copyholder, to hold to him and his heirs, or for any other eſtate, at the will of the lord, according to the cuſtom of the manor, under the uſual ſervices and returns.

§ 2. Grants of this kind are ſtill made by lords of manors, of lands parcel of the manor, and which have been demiſed or demiſable by copy, whenever ſuch lands fall into the poſſeſſion of the lord by eſcheat, forfeiture, or any other determination of a former grant.

Neceſſity of Admittance.

§ 3. Where a grant of this kind is made, the grantee muſt be admitted to the copyhold in the lord's court, and

and the admittance entered on the rolls of the cuſtomary court. For the title of the grantee depends merely upon the entry made in the court rolls.

All Lords of Manors may make Grants.

§ 4. Every lord of a manor who is in poſſeſſion, and has a lawful eſtate in the manor, may make voluntary grants of copyholds; which will bind the ſucceeding lords. If, therefore, a lord of a manor labours under any perſonal diſabilities, ſuch as idiocy or lunacy, or, if he has only an eſtate for life, or for years, he may, notwithſtanding, make copyhold grants; provided ſuch grants are warranted by the cuſtom of the manor. The lord muſt, however, be in poſſeſſion at the time of the grant, for, although he has good right and title, yet if he is not in poſſeſſion of the manor, it will not ſerve. And, on the other ſide, if he be in poſſeſſion of the manor, though he have neither right or title thereto, yet in many caſes the grant of a copyhold is good, as *dominus de facto, ſed non de jure*.

Co. Cop. ſ. 34. 4 Rep. 23 *b.* 8 —— 63 *b.* Gilb. Ten. 196.

Calth. Read. 48, 49.

Gilb. Ten. 205.

§ 5. The principle upon which this doctrine is founded, is, that copyholders were originally mere tenants at will; and ſo, though the lord *pro tempore*, had only a particular eſtate, yet he might grant copyholds, as it could be no prejudice, but rather an advantage to the ſucceeding lord, in reſpect to the rents and ſervices which were reſerved on ſuch grants. Beſides, the ſucceeding lord might turn out the copyholder at his pleaſure; and when the law was ſo altered that the copyholder acquired a permanent intereſt in his eſtate, it was ſtill held, that the lord *pro tempore* might grant copyholds in fee, though he had but a particular

particular eſtate; and it is the cuſtom which ſtill warrants and ſupports copyhold grants. For where the lord has only a particular eſtate, the copyhold grant cannot be derived out of ſuch eſtate, for, in that caſe, it muſt determine with the lord's eſtate: ſo that it is from the cuſtom that the eſtate is derived; and the lord is only the inſtrument of the cuſtom to convey.

§ 6. A biſhop may make copyhold grants which will bind his ſucceſſors; and where the temporalities of a biſhop come into the king's hands, he will be bound by ſuch grants. 4 Rep. 21 *b*.

§ 7. A lord of a manor, who is only tenant for life, or for any other particular eſtate, may grant copyholds in reverſion, though they be not executed in the life of the grantor. This poſition was doubted by lord *Coke*, but is ſupported by Lord Chief Baron *Gilbert*. Carew's caſe, Moo. 147. Gilb. Ten. 205.

§ 8. Tenant in dower, to whom a manor is aſſigned, may make grants of copyholds, not only in poſſeſſion, but alſo in reverſion, if the cuſtom of the manor warrants them. Gay v. Kay, Cro. Eliz. 661. 1 Roll. Ab. 499.

§ 9. If a guardian in ſocage grants a copyhold in reverſion, according to the cuſtom of the manor, this ſhall be a good grant, and bind the lord, though it ſhould not fall into poſſeſſion during the nonage of the ward. Shopland v. Radlen, Ow. 115. Godb. 1.

§ 10. If a lord of a manor deviſes by his will in writing that his executor ſhall grant copyholds, according 1 Inſt. 58 *b*.

ing to the cuſtom, for payment of his debts, and dies; the executor, though he has no eſtate in the manor, may make grants accordingly.

Provided they have a lawful Eſtate.

1 Inſt. 58 *b.* 4 Rep. 24 *a.*

§ 11. There is, however, one exception to this rule: For perſons not having a lawful eſtate or intereſt in a manor, cannot make copyhold grants. Thus it is ſettled, that tenants at ſufferance, diſſeiſors, abators, or intruders, cannot bind the lawful owners of a manor, by their grants of copyholds.

Rous v. Artvis, 2 Leon. 45.

§ 12. If *A.* be tenant of a manor, for the life of another, and the *ceſtui que vie* dies, and afterwards *A.* makes a copyhold grant; ſuch grant will not bind the leſſor: for, upon the death of the *ceſtui que vie*, *A.* became tenant at ſufferance, and had no lawful intereſt in the manor.

A Steward may make Grants.

Co. Cop. f. 45. 4 Rep. 30 *a.* Gilb. Ten. 221. 316.

§ 13. A ſteward of a manor, properly appointed, may make copyhold grants; for he repreſents the lord to all intents and purpoſes. And the lord of a manor may appoint a perſon to be his ſteward by word only, which will endure until he is diſcharged.

Harris v. Jays, Cro. Eliz. 699.

§ 14. In the caſe of the king, a ſteward cannot be appointed by word only; but it muſt be by patent. A ſteward appointed by the king's auditor, to hold a court, *pro hac vice*, cannot make a voluntary grant of copyholds; becauſe ſuch an auditor has no authority to appoint ſtewards.

§ 15. A ſteward,

§ 15. A ſteward, appointed by a private perſon, may make voluntary grants of copyholds, notwithſtanding any ſubſequent diſability of the lord who appointed him.

§ 16. *R. B.* ſeiſed of a manor for life, in which there were many copyholds, granted the ſtewardſhip thereof by deed to *W. S.* for life. *R. B.* was afterwards found a lunatick, and committed to *E. C.* and others. It was reſolved by *Hobart* and *Tanfield*, that the committees could not grant any copyholds, as they had no eſtate in the manor; but the lunatick, by his ſteward, might grant copyholds according to the cuſtom. Blewit's caſe, Ley. R. 47.

It was, however, ordered, that the ſteward ſhould grant none without the privity of the committees, nor before the court was acquainted therewith, and gave warrant for the granting thereof. But this was by way of caution, the grant of the ſteward being good in law.

§ 17. Whoever is capable, either by himſelf or another, to perform the ſervices of a copyholder, may take a grant of copyholds. Thus, an infant may be a copyholder, for his guardian may do the ſervices. So a married woman, and her huſband ſhall do the ſervices. But a lunatic or idiot cannot be a copyholder, becauſe they cannot do the ſervices, nor depute another perſon. To whom Grants of Copyholds may be made. Calth. R. 51, 52.

§ 18. In

The Cuſtoms of the Manor muſt be purſued.

§ 18. In all voluntary grants of copyholds the cuſtoms of the manor muſt be purſued; and Lord *Coke* obſerves, that although it is in the lord's power to keep the lands in his own hands, or to diſpoſe of them at his pleaſure, and, to that intent, he may be reputed an abſolute owner; yet, becauſe in diſpoſing of them he is bound to obſerve the cuſtom preciſely in every point, and can neither in eſtate or tenure bring in any alteration, the law accounts him cuſtom's inſtrument.

Gilb. Ten. 198.

§ 19. Lord Chief Baron *Gilbert* obſerves, on the above paſſage, that the reaſon of it ſeems to be, becauſe there is nothing but cuſtom to warrant the grant by copy; which ought therefore to be ſtrictly purſued, as to the eſtates, cuſtoms, ſervices, and tenures; or elſe it is not the eſtate that was demiſed before. But yet if there be a copyholder in fee, it ſeems the lord may releaſe part of the ſervices, and not do any prejudice to the copyholder's eſtate; for there is an eſtate in being, that appears to be the old eſtate. But when the lord grants a new eſtate by copy, ſince it is an eſtate againſt common right, and warranted only by the cuſtom, that muſt be ſtrictly purſued, to bind the heir.

Ten. 199.

§ 20. So ſtrict is the law in this point, (ſays *Gilbert*), that if the rent be reſerved in ſilver, where it anciently was in gold; or payable at two feaſts, where anciently it was payable at one feaſt; or if two copyholds eſcheat, one uſually demiſed for 20 *s.* and the other for 10 *s.*, and he demiſes both for 30 *s.*; it is not good.

§ 21. It

§ 21. It has been determined in many caſes, that a cuſtom, which enables the lord to grant greater eſtates, will alſo warrant him to grant leſſer eſtates.

§ 22. Where the cuſtom of the manor was, that the lord might *ſolum modo* grant copyholds in fee, it was, notwithſtanding, held, that he might grant them in tail, for life, or for years; for theſe eſtates were included within an eſtate in fee, and *omne majus continet in ſe minus.*

Staunton v. Barnes, Cro. Eliz. 373. 1 Roll. Ab. 511.

§ 23. If cuſtomary land within a manor hath been granted in fee, and, upon an eſcheat, the lord grants the ſame for life, ſuch grant will be good; for the cuſtom which enables him to grant in fee, will enable him to grant for life. And after the death of the tenant for life, the lord may grant the ſame again in fee; for the grant for life was no interruption of the cuſtom.

Kemp v. Carter, 1 Leon. 55.

§ 24. If the cuſtom of the manor be, that copyholds may be granted for three lives, an eſtate may be granted by copy to three perſons for the lives of two; for this is not a greater eſtate than for three lives, it being only for two lives, which is leſs than the cuſtom warrants.

Ven v. Howell, 1 Roll. Ab. 511.

§ 25. By the cuſtom of the manor of *Tregoar* in *Cornwall*, cuſtomary lands are demiſable by copy of court roll to two or three perſons for term of their lives, and of the longeſt liver of them; *habendum ſucceſſivè*

Smartle v. Penhallow, 2 Ld. Raym. 994. 6 Mod. 63.

ſucceſſivè ſicut nominantur in charta, &c. et non aliter, and the perſon firſt named in the grant enjoys the tenements to him alone during his life, and ſo to the ſecond and third, and the lord has a heriot of every ſuch perſon ſucceſſively dying ſeiſed.

The lord of the manor granted the tenements in queſtion to one *Thos. Norton,* and his aſſigns, *habendum* to him and his aſſigns, for the lives of *J. P. W. W.* and of the ſaid *Thos. Norton,* and of the longer liver of them, *ſucceſſivè*; and the queſtion was, whether this grant was warranted by the cuſtom. It was contended, that this grant was void *in toto,* not being purſuant to the cuſtom; for the grant was to *Thos. Norton* and his aſſigns, *habendum* for his own life, and the lives of *J. P.* and *W. W.* which varied from the cuſtom; and though the grant be of an inferior intereſt than is allowed by the cuſtom, yet it being prejudicial to the lord, in reſpect of his tenure, and of his ſervices, the cuſtom would not warrant it. In this caſe, *Thos. Norton* was tenant for his own life and the lives of the other two, for they were not named to take any intereſt, but only added by way of limitation of eſtate, ſo that upon the death of *Thos. Norton,* if either of the other two lives were in being, there would be an occupant of the copyhold, which would be an injury to the lord, when a ſtranger would have power to come in without his conſent.

It was determined by all the judges, that this grant was good, and warranted by the cuſtom.

§ 26. As

§ 26. As copyhold grants derive their effect from the cuſtom of the manor, and not from the eſtate of the lord, they are conſidered as paramount to, and will take place of, many other titles, prior to them in point of time.

Copyhold Grants take place of many other Eſtates.

4 Rep. 24 *a.* Gilb. Ten. 200.

§ 27. A lord of a manor granted copyhold lands for three lives, and afterwards married. The lives determined during the coverture, the lord entered into the manor, and kept the copyhold lands in his own hands for ſome time; he then granted them again by copy, and died. The wife of the lord entered and claimed dower. It was reſolved, that the copyholder ſhould hold the lands diſcharged of dower; becauſe he was in by the cuſtom, which is paramount to the title of dower.

Cham v. Dover, 1 Leon. 16. 8 Rep. 63 *b.*

Sneyd v. Sneyd, 1 Atk. 442. S. P.

§ 28. But if the heir, after the death of his anceſtor, and before an aſſignment of dower, grants lands by copy, the widow may avoid the grant; becauſe her title to Dower was then complete.

1 Inſt. 58 *b.* n. 6. Gilb. Ten. 203.

§ 29. It appears to have been formerly doubted, whether copyholds, created by voluntary grants, were ſubject to the charges or incumbrances of the lord who granted them; but it is now ſettled, that they are not ſubject to ſuch charges.

§ 30. The Earl of *Weſtmorland*, being ſeiſed in fee of the manor of *Kennington*, granted a rent-charge to Sir *Wm. Cordell* for life, and afterwards made a feoffment of the manor to Sir *John Clifton*, who made a voluntary

Sands v. Hempſton, 2 Leon. 109.

voluntary grant of a copyhoid to one *Sands* for life, according to the cuſtom of the manor, the ſame being an ancient copyhold.

Vide 1 Leon. 16. Ca. 19. 3 Leon. 59. Ca. 87. Dyer, 270. Gilb. Ten. 202. 2 Brownl. 208.

The rent-charge being in arrear, a diſtreſs was made on the copyhold granted to *Sands*. After great difference of opinion, it ſeems to have been finally ſettled, that the copyhold was not chargeable; becauſe the eſtate of the copyholder is derived from the cuſtom, which is paramount to the charge; and Lord *Coke* has laid this down in his *Compleat Copyholder*.

f. 34.

§ 31. Although by an entry for a condition broken, prior eſtates and incumbrances are in general defeated, yet copyhold grants form an exception; of which an account will be given under Title XIII. Condition.

TITLE

TITLE X.

COPYHOLD.

CHAP. III.

Of the Incidents to Copyholds.

§ 1. *Copyholders ſubject to ſeveral Services.*
4. *Entitled to Eſtovers.*
9. *But cannot commit Waſte.*
16. *Not entitled to Common.*
19. *Copyholds are deſcendible.*
21. *But are not Aſſets.*
22. *Cuſtom of Free-bench.*
28. *In what Caſes the Widow may enter.*
31. *Can only be recovered by Plaint.*
32. *Forfeited by Incontinency.*
33. *Barred by a Jointure.*
35. *And by the Alienation of the Huſband.*
43. *And by Forfeiture.*
44. *And by Grant of the Freehold to the Huſband.*
45. *Not barred by Attainder.*
46. *Cuſtom of Curteſy.*
49. *Copyholders cannot vote at Elections.*
50. *May alien by Cuſtom.*
51. *What Statutes extend to Copyholds.*
54. *Where the Statute De donis affects Copyholds.*

Section 1.

BY the general cuſtom of all manors, ſeveral ſervices are required to be done by the copyholder to his lord. The firſt of theſe is fealty, which muſt be done in perſon, and not by attorney. And Lord *Coke* obſerves, that the obligation which all copyholders are under of doing fealty, proves that they have a fixed eſtate in the land, from which they cannot be put out by the lord, as long as they obſerve the cuſtoms of the manor: whereas a bare tenant at will is not obliged to do fealty. The taking the oath of fealty is now always reſpited.

Copyholders ſubject to ſeveral Services.

9 Rep. 76 *a.*

1 Inſt. 63 *a.*

Co. Sup. f. 10.

§ 2. Suit of court is another ſervice to which all copyholders are bound: for otherwiſe it would be impoſſible for the lord to hold a copyhold court; and, therefore, every copyholder is bound to attend the lords court, and to be ſworn of the homage.

§ 3. In many manors, copyholders are alſo liable by particular cuſtoms to the payment of rent ſervice, rents of aſſiſe and reliefs; and to the performance of a variety of ſervices.

Entitled to Eſtovers.

Cro. Eliz. 5.

§ 4. *Croke* reports it to have been held in 24 *Eliz.*, that a copyholder could not by the common law take trees for houſebote, hedgebote, and cartbote, unleſs there was a ſpecial cuſtom to warrant it. But it was reſolved in 8 *Jac.* 1., that a copyholder may, of common right, and as a thing incident to the grant, take houſebote, hedgebote, and ploughbote, upon his copyhold. But the ſame may be reſtrained by cuſtom, namely, that the copyholder ſhall not take it, unleſs by aſſignment of the lord or his bailiff.

Heydon and Smith's caſe, 13 Rep. 68. 8 Rep. 63 *b.*

Id.

§ 5. It was further reſolved in the ſame caſe, that the lord cannot cut down all the timber trees, but muſt leave ſufficient for the reparation of the cuſtomary houſes, and for ploughbote, &c. for otherwiſe great depopulation would follow by the ruin of houſes, and the decay of tillage and huſbandry.

Aſhmead v. Ranger, 1 Ld. Ray. 551.

Sanford v. Stevens, 3 Bul. 282.

§ 6. Where the cuſtom of the manor is, that the copyholder ſhall employ the timber cut down, in the reparation of his tenements, yet, as to the top and

bark, which cannot be employed in repairs, he may ſell them, towards defraying the charges of the reparations.

§ 7. The Court of Chancery will direct a commiſſion to ſet out ſufficient timber and wood for all manner of botes and eſtovers, according to the cuſtom uſed within the manor, for the copyholder, and the reſt for the uſe of the lord.

Ayray v. Billingham, Rep. Temp. Finch, 199.

§ 8. It was ſaid by Lord *Holt*, that a copyholder has only a poſſeſſory property in timber trees, which, if ſevered from the freehold by tempeſt, or otherwiſe, the property will be in the lord.

Anon. 11 Mod. 68.

§ 9. A copyholder cannot commit any kind of waſte, without a particular cuſtom to warrant him: and therefore the timber growing on copyhold eſtates is, by the general cuſtom of moſt manors, the property of the lord, who may cut it down, provided he leaves a ſufficient quantity for the repairs of the copyhold.

But cannot commit Waſte. 13 Rep. 68.

§ 10. A copyholder in fee may, however, by the particular cuſtom of a manor, have a right to cut down the timber trees growing on his copyhold, and to ſell them at his pleaſure. And this has been adjudged a good cuſtom.

Glaſcock's caſe, 4 Leon. 238.

§ 11. It has alſo been adjudged, that where a copyholder for life had a power of nominating his ſucceſſor, a cuſtom enabling him to cut down and ſell timber

Rolls v. Maſon, Brow 132.

ber trees growing on his copyhold was good; for he was, *quaſi*, a copyholder in fee.

Rockey v. Huggins, Cro. Car. 220. 2 Vef. 303.

§ 12. A cuſtom, that a copyholder for life may cut down timber trees at his pleaſure, is unreaſonable, and void. For it is a deſtruction of the inheritance, and againſt the nature of a copyhold eſtate for life.

Mardiner v. Elliott, 2 Term Rep. 746.

§ 13. Where a copyhold eſtate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew, on the falling in of the lives, he cannot cut down timber growing on his copyhold.

Ten. 327. 1 P. Wms. 406. 2 Atk. 189.

§ 14. Lord Chief Baron *Gilbert* ſays, that a copyholder of inheritance cannot, without a ſpecial cuſtom, dig for mines; neither can the lord dig in the copyholder's land, on account of the great prejudice he would thereby do to the copyhold eſtate.

Deach v. Bampton, 4 Veſ. jun. 700.

§ 15. The right of a copyholder to cut down timber is a legal one; and where he exceeds or abuſes it, he will forfeit his copyhold. In conſequence of this doctrine, the Court of Chancery will not grant an injunction at the ſuit of a lord of a manor, to reſtrain his copyholder from committing waſte.

Not entitled to Common. 4 Rep. 31 *b.*

§ 16. Copyholders are not entitled, by the general cuſtom, to common on the waſtes of the manor, But one copyholder may have a right to common on the lord's land by cuſtom. And, in many manors, ſome of

of the copyholders have a right of common on one waſte of the manor, and others on another.

§ 17. Where copyholders for life, according to the cuſtom, have uſed to have common in the waſtes of the lord of the manor, or eſtovers in his woods, or any other profit *apprender* in any part of the manor, and afterwards the lord aliens the waſtes or woods to another in fee, if the lord grants copyholds for lives, the grantees will be entitled to common of paſture, or common of eſtovers, notwithſtanding the ſeverance, for the title of the copyholder is paramount to the ſeverance; and the cuſtom unites the common, or eſtovers, which are but acceſſaries or incidents, as long as the lands, being the principal, are maintained by the cuſtom; and theſe cuſtomary appurtenances are not derived from the eſtate of the lord, for he is the owner of the freehold and inheritance of the manor; but they are appertaining to the cuſtomary eſtate of the copyholder, after the grant made to him, which is preſerved by the cuſtom, and is paramount to the ſeverance. 8 Rep. 63 *b*. 64 *a*.

§ 18. If a copyhold to which common belonged eſcheats, and the lord regrants it, with all common appurtenant, the grantee ſhall have common: for, although the antient common be extinct, yet there was a new grant. Worledge v. Kingſwell, Cro. Eliz. 794.

§ 19. An eſtate held by copy of court roll, which is granted to the copyholder and his heirs, is deſcendible; Copyholds are deſcendible.

Co. Cop. f. 50. 4 Rep. 22 *a.* Gilb. Ten. 158. Vide Tit. 29.

ible; and when the cuſtom has created an inheritance, the deſcent will be directed according to the maxims and rules of the common law, unleſs the cuſtom directs it otherwiſe; in which caſe, the cuſtom will prevail.

3 P. Wms. 151. 2 Atk. 449. Gilb. Ten. 292.

§ 20. The heir-at-law of a copyholder is not, however, compellable to accept of the inheritance, unleſs he chooſes to do it. But if he does not come in and accept, the lord may ſeiſe the copyhold to his own uſe.

But are not Aſſets. 4 Rep. 22 *a.*

§ 21. Although copyholds are deſcendible, yet they do not, in other reſpects, partake of the nature of freehold eſtates of inheritance; and are, therefore, not aſſets, in the hands of the heir. For as they are deſcendible only by cuſtom, they have not any of the collateral qualities of deſcent, unleſs thoſe qualities are alſo eſtabliſhed by the cuſtom.

Cuſtom of Free-bench.

§ 22. As the copyholder has not the freehold of the land, it follows, that his widow is not, by the common law, entitled to dower. But in almoſt all manors in which there are copyholds, the cuſtom is, that the widow of each copyholder ſhall have a certain portion of her huſband's copyhold after his death, which is generally called *the Widow's Free Bench.*

§ 23. As this right depends on the particular cuſtoms of each manor, it is not extraordinary that it ſhould vary in different manors; both as to the proportion

portion of the huſband's land, to which the widow becomes entitled, and the various conditions under which it is held.

§ 24. In moſt manors, free bench conſiſts of one half of the huſband's copyhold; although, in others, it conſiſts of a third or fourth part, and in ſome few, of the whole copyhold. And free bench is not only incident to copyholds of inheritance, but alſo in ſome manors, to copyholds held only for life; of which, there is an inſtance in the manor of *Stackwood* in *Dorſetſhire*. 1 Inſt. 33 *b*. Howard v. Bartlett, Hob. 181.

§ 25. A right to free bench attaches before the admittance of the huſband, upon a deſcent, or a ſurrender. But a widow is not entitled to free-bench out of the truſt of a copyhold; as will be ſhewn under Title 12. Truſt. Gilb. Ten. 288. Vaughan v. Atkins, Tit. 37.

§ 26. With reſpect to the quantity of eſtate, to which the widow becomes entitled as her free-bench, in general, ſhe only acquires an eſtate for her own life; but, in ſome manors, ſhe becomes entitled to an eſtate in fee, and, in others, to an eſtate tail. 1 Keb. 926.

§ 27. Where the widow of the anceſtor holds a moiety of the copyhold as her free-bench, the widow of the ſon will only be entitled to a moiety of the remaining moiety, upon the principle adopted in the caſe of dower. Baker v. Berisford, Ray. 58. Tit. 6. c. 3. ſ. 24.

§ 28. Where

In what Caſes the Widow may enter.

Kitch. 123.

§ 28. Where the widow takes the whole of the land as her free-bench, ſhe may enter immediately upon it before any admittance; as the law caſts the poſſeſſion on her, in the ſame manner as it does on the heir, in caſes of deſcent. But where the widow takes a portion only of the lands, it ſhould ſeem that the poſſeſſion is not caſt on her, any more than in caſe of dower at common law; and, conſequently, that ſhe is not entitled to enter without an aſſignment.

4 Rep 30*b*.

§ 29. Where a widow is entitled by the cuſtom to free-bench or dower of a copyhold, ſhe ſhall have all the incidents to dower; and therefore, will be entitled to damages under the ſtatute of *Merton*.

Tit. 6. ch. 4. f. 36.

Oland's caſe, 5 Rep. 116. Cro. Eliz. 460.

§ 30. Where free-bench in a copyhold eſtate determines by the act of God, there ſhall be emblements; but where it determines by the act of the widow herſelf, as by incontinency, or a ſecond marriage, it is otherwiſe.

Can only be recovered by Plaint.

Chapman v. Sharpe, 2 Show. 184.

§ 31. An ejectment will not lie for a third part of a copyhold tenement in the nature of dower; but the widow muſt levy a plaint in the nature of a writ of dower, in the manor court, and the homage muſt ſever and ſet out the ſame. But if the cuſtom be for the widow to have a third part, not in nature of dower, but in common with the heir, it is then otherwiſe.

Forfeited by Incontinency.

§ 32. By the cuſtom of many manors, free-bench is forfeited by incontinency, or a ſecond marriage. Thus,

in

in the manor of *Eaſt* and *Weſt Enborne*, in *Berkſhire*, the widows of copyholders are entitled to free-bench, only, *Dum ſola et caſta fuerint.* And if a widow is found guilty of incontinency, ſhe forfeits her free-bench; unleſs ſhe comes into court riding backwards on a black ram, with his tail in her hand, and repeats certain lines. Blount. Frag. 265.

The ſame cuſtom prevails in the manor of *Chadleworth* in *Berkſhire*, and alſo in that of *Torre* in *Devonſhire.*

§ 33. A jointure is a good bar to free-bench, as well as to dower, Barred by Jointure.

§ 34. A man, in conſideration of his marriage, and to make ſome proviſion for his wife, by deed executed before marriage, ſettled upon her, if ſhe ſurvived him, part of his real eſtate for her jointure, and in full bar and recompence of all dower or thirds, which ſhe could be entitled to, or any way claim, out of any lands, tenements, meſſuages, or hereditaments, of which he then was, or ever after during the coverture, ſhould be ſeiſed of freehold or inheritance. After the marriage, the huſband purchaſed copyhold eſtates, of which the wife got poſſeſſion upon his death, as her free-bench. It was decreed againſt the widow, upon the principle, that the jointure barred her of free-bench as well as of dower, Walker v. Walker, 1 Veſ. 54. Vide Jordan v. Savage, Tit. 7. S. P.

§ 35. The right to free-bench does not attach on all the copyholds whereof the huſband was poſſeſſed during And by the Alienation of the Huſband.

ing the coverture, but only on thoſe of which he died poſſeſſed; or, as the cuſtom uſually, though inaccurately, expreſſes it, whereof he died ſeiſed. So that a copyholder may defeat his wife's right to free-bench, by any ſpecies of alienation.

Fareley's caſe, Cro. Ja. 36.

§ 36. It was held by all the court in 2 *Jac.* 1., that if a copyholder makes a leaſe for years, of lands whereof a woman, by the cuſtom, is to have her widow's eſtate, ſhe ſhall not avoid the leaſe, unleſs there be a ſpecial cuſtom; for the leſſee comes in under the cuſtom, and by the lord's licence, as well as the wife.

Ten. 321.

§ 37. Lord Chief Baron *Gilbert* makes the following obſervations on this caſe: "It ſeems to me, that "the feme ſhall not, in this caſe, be endowed of the "third part of the rent and reverſion, becauſe cuſ- "toms ought to be ſtrictly purſued, and that is, only "to be endowed of the land; yet it ſeems, after the "leaſe ended, ſhe ſhall be endowed, for the huſband "did die ſeiſed, (the poſſeſſion of his leſſee being his "own poſſeſſion). But it was agreed, in this caſe, "that, by ſpecial cuſtom, the feme might avoid the "leaſe. This, among other caſes, proves that a copy- "holder may diſpoſe of his land, and bar his wife of "her free-bench, unleſs there be a particular cuſtom "that ſhe ſhall avoid any alienation, &c. made by "him; for then the particular cuſtom ſhall, as it "ſeems, avoid his charge, as well in the caſe of copy- "hold as freehold eſtates, by the common law."

§ 38. Where

§ 38. Where the cuſtom of the manor was, that the wives of copyholders dying tenants of the manor, ſhould be endowed; a copyholder became a bankrupt, and the commiſſioners bargained and ſold the copyhold for the benefit of his creditors, and the bargain and ſale was duly inrolled. The copyholder died before the bargainee was admitted. It was reſolved, that the widow was thereby barred of her free-bench, becauſe her huſband did not die tenant. Parker v. Bleeke, Cro. Car. 568.

§ 39. A perſon ſurrendered his copyhold by way of mortgage, and died without paying the mortgage money, leaving a widow who claimed dower. Benſon v. Scott. 4 Mod. 251. Skin. 406.

The court ſaid, the widow's title does not commence by the marriage; if it did, then the huſband could do nothing to prejudice it; but it was plain he might alien or extinguiſh his right. The free-bench grows out of the eſtate of the huſband; and it is his dying ſeiſed, which gives the widow a title; and as the huſband had a defeaſible eſtate, ſo the wife may have her free-bench defeated.

§ 40. Upon a motion for a new trial, it appeared, that the cuſtom of the manor of *Warminſter* was, to grant copyholds for three lives. That the firſt life had a power of ſurrendering the whole eſtate; and the widow of a tenant who died ſeiſed, was entitled to her free-bench. That *F.*, then copyholder for three lives, ſurrendered to *Hurd*, the deceaſed huſband of the defendant, who, by licence from the laſt lord, demiſed to *Singer* for 99 years, by way of mortgage. Then *Hurd* Saliſbury v. Hurd, Cowp. 481.

Hurd died, and *Singer* demiſed to the plaintiff. The widow of *Hurd* claimed her free-bench; and the court was of opinion, that ſhe could not, in this caſe, recover it. They held there was a great difference between the cuſtom of free-bench found in this caſe, and dower; in the latter, the widow is entitled to dower of all lands whereof her huſband was ſeiſed during the coverture; but here her right was confined to thoſe lands only, whereof her huſband ſhould die ſeiſed.

§ 41. Even an agreement to convey, will, in equity, bar the widow of a copyholder of her free-bench.

Hinton v. Hinton, 2 Vef 631. Amb. 277.

§ 42. Huſband, copyholder for life of an eſtate, in which, by the cuſtom of the manor, his widow was entitled to free-bench, being in jail, entered into an agreement for the ſale of that eſtate for a valuable conſideration to his ſon: the huſband died, without having executed the agreement, by an actual ſurrender of the copyhold, and paſſing the legal eſtate to the ſon; who brought his bill for a ſpecific performance of the agreement, and that to the excluſion of the widow's free-bench.

Brown v. Raindle, 3 Vef. jun. 256. S. P.

Lord *Hardwicke* decreed, that the widow was bound by her huſband's agreement, and muſt therefore ſurrender her free-bench to the ſon.

And by Forfeiture. 1 Freem. Rep. 516.

§ 43. If a copyholder commits a forfeiture, his widow will thereby loſe her free-bench. For if he had ſurrendered his eſtate, it would have bound her; therefore, any other act which determines his eſtate, muſt have the ſame effect.

§ 44. Where

§ 44. Where the lord conveyed the freehold of the land to the copyholder in fee, it was reſolved that the widow ſhould not have her free-bench. But if the lord had enfeoffed a ſtranger, it would have been otherwiſe.

And by Grant of the Freehold to the Huſband. Laſhmere v. Avery, Cro. Ja. 126. Vide ch. 6.

§ 45. Free-bench is not loſt by the attainder of the huſband for high treaſon; becauſe the right of the wife is derived from the cuſtom.

Not barred by Attainder. Hard. R. 434.

§ 46. Curteſy is not incident to copyhold eſtates any more than dower, unleſs there be a ſpecial cuſtom to warrant it; for the freehold and inheritance being in the lord, and the copyhold being only a cuſtomary right of taking the profits, time out of mind, at the will of the lord; this cuſtom, like all others, muſt be a law to itſelf; and all eſtates derived thereout, are ſo far good, as they are warranted by that law, and no farther. If, therefore, there be no cuſtom for a man to be tenant by the curteſy of his wife's eſtate, there is no law by which he can claim it; and therefore, where a cuſtom of holding by the curteſy has prevailed, it is conſtrued literally, and not extended beyond the words. So that, if the cuſtom is, that where a man marries a cuſtomary tenant of a manor, &c. the woman muſt be a copyholder at the time of the marriage.

Cuſtom of Curteſy. 4 Rep. 22 *b.* Cro. Eliz. 361.

§ 47. The cuſtom of a manor was, that, if any man took to wife a cuſtomary tenant of the ſaid manor, and had iſſue, and out-lived his wife, he ſhould be tenant

Savage's caſe, 2 Leon. 109. 208.

tenant by the curteſy. A perſon pleaded that he took to wife one *Ann*, to whom, during the ſaid coverture, a cuſtomary tenement of the ſaid manor did deſcend: that he had iſſue, and that ſhe was dead. It was adjudged, that the huſband was not entitled to curteſy in this eſtate, under the cuſtom; becauſe his wife was not a cuſtomary tenant at the time of the marriage.

Ever v. Aſton, Mo. 271. 7 Vin. Ab. 155. pl. 14.

§ 48. The cuſtom of a manor was, that if a man had a wife ſeiſed in fee of copyhold lands, according to the cuſtom of the manor, and had iſſue by her, that he ſhould be tenant by the curteſy, it was found, that *A.*, a copyholder, was ſeiſed, and had iſſue a daughter, who was married to *J. S.* who had iſſue. *A.* died, his daughter entered, but died before admittance.

Gilb. Ten. 287.

The court ſeemed of opinion, that the huſband was entitled to be tenant by the curteſy before admittance of the wife, and that the delay of admittance by the lord ſhould not prejudice the huſband, who was a third perſon.

Copyholders cannot vote at Elections.

Vide ante, ch. 1. ſ. 10.

§ 49. As mere copyholders have no freehold eſtate, they are not allowed to vote for the election of knights of the ſhire. But at the great election for *Oxfordſhire* in the year 1754, a queſtion aroſe, whether free copyholders, holding according to the cuſtom of the manor, and not at the will of the lord, were entitled to vote.

Sir

Sir *William Blackſtone* has written a tract on this ſubject, intituled, "*Conſiderations on Copyholders*," in which he contends, that copyholders of this kind were not, by the old law, entitled to vote for knights of the ſhire; becauſe they were, in fact, villein ſockmen, whoſe ſervices were baſe and ſervile, though reduced to a certainty; and therefore, their eſtates were not compriſed under the denomination of free lands or tenements, or freehold, within the meaning of the ſtatute of *Hen.* 6.: and this opinion is confirmed by the ſtatute 31 *Geo.* 2. c. 14. which enacts, that no perſon who holds his eſtate by copy of court roll ſhall be entitled thereby to vote at the election of a knight of the ſhire.

May alien by Cuſtom, Blac. Tra. 230.

§ 50. Copyhold eſtates are not alienable by feoffment, or other aſſurance at common law; which is a proof that they are derived from the tenure in villeinage. But by the general cuſtom of all manors, a copyholder may, by ſurrendering his eſtate to the lord, to the uſe of another perſon, alienate it. And a copyholder may, alſo, by the general cuſtom, make a leaſe for one year of his copyhold.

Vide Tit. 37.

What Statutes extend to Copyholds.

§ 51. Eſtates held by copy of court roll are as much under the power and controul of the Legiſlature as any other kind of property. But where copyhold eſtates are not expreſsly mentioned in an act of parliament, it has been held in many inſtances, that ſuch an act does not extend to them; upon the ground, that it was not the intention of the Legiſlature that it ſhould affect copyholds.

Co. Cop. f. 53.

§ 52. Lord *Coke* lays down the following rules for diſtinguiſhing between thoſe ſtatutes that do, or do not, extend to copyholds.

Where an act of parliament alters the ſervice, tenure, or intereſt of the land, or other thing, in prejudice of the lord, or of the cuſtom of the manor, or in prejudice of the tenant, there the general words of ſuch an act of parliament extend not to coyyholds. But where an act is generally made for the good of the commonwealth, and no prejudice may accrue by reaſon of the alteration of any intereſt, ſervice, tenure, or cuſtom of the manor, there, uſually, copyholds are within the general purview of ſuch acts.

§ 53. In conformity to theſe principles, it is held, that the ſtatute 4 *Hen.* 7., of fines, the ſtatutes of bankruptcy, the ſtatutes of limitations, and many others, extend to copyholds.

But it is alſo ſettled, that the ſtatute *Weſtminſter* 2. ch. 20. of executions, the ſtatute 27 *Hen.* 8. c. 10. of uſes, and ſeveral other ſtatutes, do not extend to copyholds: of which, notice will be taken in the ſubſequent Titles.

Where the Statute De donis affects Copyholds. Co. Cop. f. 53. Rowden v. Malſter, Cro. Ja. 42.

§ 54. No point of law has been more debated than, whether the ſtatute *De Donis Conditionalibus*, which creates eſtates tail, extends to copyholds. In a caſe which aroſe in 18 *Jac.* 1., the queſtion was, whether the ſurrender of a copyhold eſtate to a perſon and the heirs male of his body, (there being no cuſtom to warrant

rant ſuch an eſtate), gave the ſurrenderee an eſtate tail, under the ſtatute *De Donis*, or a fee-ſimple conditional at common law.

It was held by *Croke*, and two other Juſtices, againſt the opinion of *Yelverton*, that the ſtatute *De Donis* did not extend to copyhold eſtates, and, conſequently, that the ſurrenderee took a conditional fee: 1ſt, Becauſe it would be prejudicial to lords of manors, for by this means the tenure would be altered, as the donee in tail, without any ſpecial reſervation, ought to hold of the donor, by the ſame ſervices by which the donor himſelf holds; and he who comes in by ſurrender and admittance of the lord, to hold to him and his heirs of his body, cannot hold of the perſon who made the ſurrender, but of the lord of the manor to whom he becomes tenant, and bound to perform his ſervices: 2d, The words of the ſtatute *De Donis* are, "*Quod voluntas donatoris in charta ſua manifeſte expreſſa de cetero obſervetur;*" which proves the intention of the ſtatute, that no lands ſhould be intailable, but ſuch as might be given by charter or deed, which copyholds cannot: 3d, The intention of the ſtatute can only be extended to things whereof a fine may be levied; for it provides *quod finis ipſo jure ſit nullus;* and no fine can be levied of a copyhold eſtate: 4th, When the ſtatute *De Donis* was made, copyholds were no more than mere tenancies at will, which might have been defeated by the lord; againſt whom, the tenant had no remedy but in Chancery.

§ 55. The authority of this determination, and of ſome others, founded on the ſame principles, has been controverted by ſeveral great perſons, and particularly by Lord Chief Baron *Gilbert*. It has, however, been long ſettled, that the ſtatute *De Donis* does not extend to copyhold eſtates, without a ſpecial cuſtom; but that, when there has been a cuſtom of intailing copyholds, the ſtatute *De Donis* co-operating with the cuſtom, will give to ſuch an eſtate all the qualities of an eſtate tail.

6 Vin. Ab. 197. Ten. 165.

1 Inſt. 60 *b.* 5 Term R. 111.

§ 56. Lord *Coke* ſays, that although lands have antiently and uſually been granted by copy of court roll, to many men and the heirs of their bodies, that will not prove a cuſtom of intailing copyholds; for ſuch grants might have created eſtates in fee-ſimple conditional at common-law. But if a remainder has been limited over after ſuch an eſtate, and enjoyed; or, if the iſſue in tail have avoided the alienation of the anceſtor; or, if they have recovered the ſame in writs of formedon in the deſcender, theſe, and ſuch like, would be ſufficient to prove a cuſtom of creating intails.

Id. 2 Veſey R. 601.

§ 57. There are various modes of barring intails of copyholds; of which, an account will be given in Title 37., Alienation by Cuſtom.

TITLE

TITLE X.

COPYHOLD.

CHAP. IV.

Of Fines and Heriots.

§ 1. *Fines upon Deſcent.*
3. *Fines ſometimes due by Tenants by the Curteſy, and in Dower.*
4. *Fines for Alienation.*
5. *No Fine upon an Agreement to ſurrender.*
7. *Fines due upon Bankruptcy.*
8. *Fines due upon a Deviſe.*
10. *Fines only due on Admittance.*
16. *Admittance of the Tenant for Life ſufficient.*
19. *No Fine due unleſs there is an Alteration of the Tenant.*
22. *Fines on the Change of the Lord.*
27. *How much may be demanded as a Fine.*
33. *No more than Two Years Value can be required.*
36. *Fines muſt be aſſeſſed ſeverally.*
37. *When Fines are payable.*
38. *Remedies for recovering Fines.*
41. *Of Heriots.*

Section 1.

Fines upon Deſcent.

WHEN copyhold eſtates were allowed to deſcend to the children of the copyholders, the lords of the manors, from whoſe permiſſion and continued acquieſence the right of deſcent was derived, would not admit the heir of a copyholder to ſucceed to the land, whereof his anceſtor died poſſeſſed, without payment of a ſum of money; from whence aroſe a general cuſtom, that, upon every deſcent of a copyhold, a ſum of money, or fine, was due from the

heir to the lord, as a consideration for the renewal of the grant.

4 Rep. 22 *b.* 2 Term Rep. 485.

§ 2. The lord is not entitled to a fine upon a descent, until the heir is admitted. But the death of the heir, or an alienation made by him before admittance, will not deprive the lord of his right to a fine.

Fines sometimes due by Tenants by the Curtesy, and in Dower. Co.Cop. f.56. Gilb. Ten. 223. Noy, 29.

§ 3. Where a man acquires a copyhold estate by the curtesy, or a woman acquires a copyhold as her free-bench, a fine is payable on the admittance of those tenants by the custom of some manors, and in others no fine is due.

Fines for Alienation. Vide Tit. 37.

§ 4. As the power of alienating copyhold estates was originally derived from the bounty of the lord, and a continued acquiescence on his part, and as the lord is in fact a party to every alienation, by admitting the alienee to become his tenant, a fine was paid to the lord by the alienee; from which arose a general custom, that a fine was due to the lord of the manor upon every alienation of a copyhold estate.

1 Inst. 59 *b.*

No Fine upon an Agreement to surrender.

§ 5. A covenant or agreement to surrender a copyhold, will not entitle the lord to demand a fine from the person with whom such covenant or agreement is made, unless he demands to be admitted.

Rex v. Lord of Hendon, 2 Term Rep. 484.

§ 6. One *Bonham*, a copyholder of the manor of *Hendon*, covenanted to assign and surrender to *Goodrich*; which

which covenant the homage had preſented at a court, and the conſideration money was paid, but no ſurrender was ever made to him.

Goodrich then aſſigned to *Rankin* his intereſt in the copyhold, and *Bonham* ſurrendered to *Rankin*, who claimed to be admitted. The lord of the manor reſiſted the application, on the ground that no fine had ever been paid to the lord for the conveyance to *Goodrich*, and that this was a mode of cheating the lord of his fines; that before *Rankin* was admitted, he ought to pay both the fines which were due.

The court ſaid, that all the lord had a right to require was, to have a tenant, and in this caſe he had one during the whole time; and that any private agreement between *Bonham* and *Goodrich*, not followed up by a ſurrender of the eſtate, could not give the lord of the manor a right to any fine, notwithſtanding it was preſented by the homage.

Fines due upon Bankruptcy. 1 Atk. 95.

§ 7. The aſſignees of a bankrupt muſt be admitted; and are, conſequently, ſubject to the payment of a fine. Lord *Hardwicke* has therefore recommended it to commiſſioners of bankrupts to except copyholds out of the deed of aſſignment of the bankrupt's eſtate, becauſe it would ſave two fines; for the commiſſioners, where the creditors could meet with a purchaſer of the copyhold, might convey to him in the firſt inſtance.

Fines due upon Deviſe.

§ 8. The executor of a deviſee for years of a copyhold eſtate, claiming under the teſtator, muſt

be admitted; and is therefore ſubject to the payment of a fine.

Earl of Bath v. Abney. 1 Burr. 206.

§ 9. *Henry Grey*, having a copyhold eſtate, deviſed it to *John Taylour* and *Arthur Lake*, their executors and adminiſtrators, for 99 years, if three perſons ſhould ſo long live. After the death of the teſtator, *Taylour* and *Lake* were admitted and paid a fine of 280 *l.* *Taylour* ſurvived *Lake*, and died, having appointed Doctor *John Taylour* his executor; and the queſtion was, whether he was obliged to be admitted and pay a fine. A caſe being ſent out of Chancery for the opinion of the Court of King's Bench, it was certified, that the executor of the ſurviving truſtee ought to come in, and be admitted.

Fines only due on Admittance.

§ 10. A fine being only due on the admittance of a new tenant, it follows, that where a perſon, who acquires an intereſt in a copyhold eſtate, is not obliged, by the nature of that intereſt, to get himſelf admitted tenant to the lord, he is not ſubject to the payment of a fine.

Co. Cop. f. 56.

§ 11. Thus, if a perſon marries a woman, having a copyhold eſtate, though an intereſt becomes thereby veſted in him, yet, as he is not ſeiſed *jure proprio*, but only *jure alieno*, he is not obliged to be admitted; and, therefore, he is not liable to the payment of a fine.

Id.

§ 12. It is the ſame if the wife be a termor of a copyhold; for, though the term becomes veſted in the huſband

huſband by the marriage, ſo that he may diſpoſe of it as he pleaſes, yet he is only poſſeſſed of it in right of his wife.

§ 13. Where, by the cuſtom of the manor, the bailiff is to have the wardſhip of the heir of a copyholder, who is under age, ſuch a guardian ſhall not be admitted, nor pay a fine; becauſe he is but a pernor of the profits, and that not in his own right, but in the right of his ward. Id.

§ 14. Where a teſtator directs certain perſons to ſell his copyhold eſtates; ſuch perſons need not be admitted, and conſequently are not liable to the payment of a fine.

§ 15. A perſon, ſeiſed in fee of copyhold lands, did, by his will, order and direct that *A.* and *B.* ſhould make ſale of the ſaid copyhold premiſes, and apply and diſpoſe of the monies, ariſing thereby, in the manner mentioned in his will. *A.* and *B.* bargained and ſold the lands by deed to *Richard Ray*, and his heirs. *Ray* claimed to be admitted under this deed, which the lord of the manor refuſed; inſiſting that the truſtees ſhould have been admitted to the ſaid premiſes previous to their making ſale thereof, and paid a fine for their admiſſion. Holder v. Preſton, 2 Wilſ. Rep. 440.

The court was of opinion, that the truſtees were not obliged to come in and be admitted: becauſe they had no eſtate or intereſt, but only a naked power or authority;

authority; and that the lord was bound to admit the purchaſer *Ray* to the copyhold.

Admittance of the Tenant for Life ſufficient.

Cro. Eliz. 504.
1 Mod. 102.
1 Burr. 212.

§ 16. By the general cuſtom of copyholds, the admittance of a tenant for life is an admittance of the perſons in remainder; and therefore, no fine is due from the remainder-men. For although there is an alteration of the tenant, yet there is no alteration of the eſtate; and the fine is aſſeſſed, not for the particular eſtate, but for the whole inheritance.

Barnes v. Corke, 3 Lev. 308.

§ 17. The father being ſeiſed of a copyhold eſtate in fee, ſurrendered it to the uſe of himſelf and his wife for life, remainder to his ſon in tail. The father and mother were admitted, and paid a fine; and being both dead, the ſon prayed to be admitted to the remainder, which was done, and a fine of 58 *l.* ſet upon him, which he refuſed to pay, alleging, that none was due, he being admitted by the admittance of his father and mother; and adjudged that no fine was due, unleſs there was a ſpecial cuſtom for it.

4 Rep. 23 *a.* Blackburne v. Graves, 1 Mod. 120.

§ 18. In ſome manors fines are due, by particular cuſtom, on the admittance of perſons in remainder. But even in this caſe, Lord *Coke* ſays, that the admittance of the tenant for life is the admittance of the perſon in remainder, but not to prejudice the lord of his fine, to which he may be entitled, by the particular cuſtom of the manor.

§ 19. A fine

§ 19. A fine is only due as a conſideration for the admittance of a new tenant; and therefore, where there is no alteration of the tenant, the lord is not entitled to a fine.

No Fine due unleſs there is an Alteration of the Tenant.

§ 20. Thus, if a copyholder in fee ſurrenders for life, reſerving the reverſion, and the leſſee for life dies, the copyholder may re-enter without paying a fine, becauſe the reverſion was never out of him.

Co. Cop. f. 56.

§ 21. So, if a copyholder grants his copyhold to a ſtranger upon condition, and afterwards enters for the condition broken, he is not liable to the payment of a fine, becauſe he comes in of his old eſtate.

Id.

Vide Tit. 13.

§ 22. By the cuſtom of many manors, a fine is due on every change of the lord which happens by the act of God. But a cuſtom that a fine is due on every change of the lord by alienation, has been adjudged to be a void cuſtom. For by this means, the tenants might be oppreſſed by a multitude of fines.

Fines on the Change of the Lord.

1 Inſt. 59 *b.*

§ 23. In a manor where a fine was due by the cuſtom from all the tenants on the death of the laſt admitting lord or lady, a huſband, tenant for life in remainder after the death of his wife, under a marriage ſettlement, is entitled to fines from all the tenants, on the death of his wife, the laſt admitting lady.

§ 24. Upon the death of the Ducheſs of *Somerſet*, the Duke her huſband, who was tenant for life in remainder

Duke of Somerſet v. France, 1 Stra. 654.

mainder after the Ducheſs, under the ſettlement made on his marriage, claimed a general fine of the ſeveral cuſtomary tenants of the manors of *Cockermouth*, &c. in the county of *Cumberland*, which were the inheritance of the Ducheſs; and the Duke having aſſeſſed their fines, and the tenants having refuſed to pay them, the Duke brought his bill in the Court of Chancery, to eſtabliſh his right to theſe fines as the next admitting lord. The bill ſtated, that it was the cuſtom of theſe manors, for the lord or lady thereof for the time being, to admit the ſeveral tenants of the manors to their reſpective eſtates; and that, by virtue of ſuch admittances, the ſeveral tenants had a right to hold their reſpective eſtates during the joint lives of ſuch tenant, and ſuch admitting lord or lady. That, in conſideration of ſuch admittances from the lord, the tenants had, time out of mind, reſpectively paid to ſuch admitting lord, a fine or *greſſum*, which had been generally aſſeſſed by the lord's ſteward at a court held for that purpoſe, called *the Court of Dimiſſions*. And that theſe fines or *greſſums* are called *the General Fines*, and are due to the next ſucceeding lord, upon the death of the laſt admitting lord, by whoſe death there is a general determination of the eſtates of the tenants. The fines which the Duke demanded, were the general fines, which he inſiſted were due to him, as next admitting lord, upon the death of the Ducheſs. And the bill ſet forth, that the Ducheſs, being the lady of theſe manors, and having married the Duke, a court of dimiſſions was held in the names of the Duke and Ducheſs, in order to grant the tenants new eſtates, their

their former having been determined by the death of the Ducheſs's father. And at ſuch court, admittances were granted to the ſeveral tenants during the joint lives of the Ducheſs and the tenants. That upon the death of the Ducheſs, the Duke became lord of the ſaid manors, and, the tenants eſtates being determined by the death of the Ducheſs, the Duke, as next admitting lord, had a right to a general fine. The defendants, in their anſwer, inſiſted, that by the cuſtom of theſe manors, a lord who was tenant by the curteſy, or lady tenant in dower, had no right to a general fine; and that they were only obliged to pay a general fine to the lord who comes in by deſcent, or to him that comes *in loco hæredis*. They inſiſted, that although the Duke was become tenant for life of theſe manors by the Ducheſs's death, yet no fine was due to him; for, if he had been tenant by the curteſy, no fine would have been due, and his claiming by ſettlement could better his caſe; for then it would be in the power of the lords of ſuch manors to multiply the tenants fines, and greatly burthen their eſtates, if every ſuch lord, who had an intervening eſtate by ſettlement, ſhould be entitled to a general fine.

Lord Chancellor *King*.—The principal queſtion is, whether a fine is due to the Duke from his tenants, upon the death of his Ducheſs? And, in reſolving this queſtion, it is firſt to be conſidered, upon what account theſe general fines become due. Now, it appears from the nature of theſe admittances, that, upon the death of the laſt admitting lord, all the eſtates of the tenants which are held under his admittances are determined;

determined; and their eſtates being ſo determined, it is neceſſary for the tenants, before they can have any new eſtate, to have a regrant from the ſucceeding and next admitting lord; which regrant they have a right to; and that right gives their eſtates the denomination of tenant-right-eſtates. From hence, it appears, that the fines are paid upon account of the admiſſion to the new eſtate, and, therefore, that the lord who hath a right to admit, hath a right to the fines: the lord grants the tenant a new eſtate, and, in conſideration of that, a fine becomes due to him from the tenant. The only queſtion, then, ſeems to be, whether the Duke hath a right to admit, and the tenants ſeem to agree that he has; for they allow, that if a particular tenant dies, the Duke, upon the admiſſion of his heir, is entitled to a dropping fine: nor can the Duke be entitled to his dropping fine, if he be not the admitting lord. And if he hath a power to admit, and hath a right to a fine upon the determination of a particular eſtate, upon the death of a particular tenant, why hath he not an equal power to admit, and an equal right to his fines, upon the determination of the tenants eſtates in general, by the death of the laſt admitting lord? It is very extraordinary to allow it in the one caſe, and not in the other. If a particular tenant dies, his eſtate is determined, and his heir muſt pay a fine to the Duke; yet, if the laſt admitting lord dies, all the eſtates of the tenants are determined, and yet the Duke has no right to a fine. It hath been objected, that this is multiplying the fines of the tenants, and ſubjecting them to frequent burthens of this kind: But where is the inconveniency to the tenants? They

are ſtill to hold during their own lives, and the life of the lord who admits them; and that is the very tenure of their eſtates: nay, if a leſſee for years, or any other *dominus pro tempore*, ſhould admit them, their eſtates would be good, according to theſe admittances, during their own lives, and the life of ſuch lord; and the determination of the lord's eſtate would have no influence upon theirs. Indeed, if there ſhould appear to be any fraud or contrivance in a ſettlement of this kind, by putting in a number of lives ſucceſſively on purpoſe to multiply the fines of the tenants, this court would undoubtedly interpoſe in ſuch caſe, and relieve them; but, in the preſent caſe, nothing of that kind can be pretended.

Theſe are my preſent thoughts on the ſubject; but, as an iſſue has been inſiſted on, I readily agree to it.

An iſſue was accordingly tried at the bar of the Court of King's Bench by a jury of *Middleſex*. Whether a general fine was due to the Duke of *Somerſet* from the tenants of the manors of *Cockermouth*, &c. as next admitting lord, upon the death of the Ducheſs of *Somerſet*. And the jury, by the direction of the court, brought in a verdict for the Duke of *Somerſet*.

The cauſe came on again before the Chancellor, who decreed the tenants to pay their fines, and gave the Duke his coſts.

§ 25. By

§ 25. By the cuſtom of many manors in *Cumberland* and *Weſtmoreland*, a fine is due on the death of the laſt admitting lord, whether ſuch laſt admitting lord was, at the time of his death, in poſſeſſion of the manor or not; and this cuſtom was held good by the Houſe of Lords.

Lowther v. Raw, 2 Bro. Parl. Ca. 451.

§ 26. *Philip* Duke of *Wharton*, became entitled, by deſcent, to ſeveral manors in *Cumberland* and *Weſtmoreland*, in which the cuſtom was, that the tenants ſhould pay a fine upon change of the lord by death. In the year 1721, the Duke ſold theſe manors to Mr. *Lowther*, and having afterwards withdrawn himſelf from the kingdom, he died in *Spain* in the year 1721. Mr. *Lowther* aſſeſſed a general fine upon all the tenants in conſequence of the Duke's death, which they refuſed to pay. He then filed his bill in Chancery for payment of theſe fines. Lord *Talbot* diſmiſſed the bill: but the Houſe of Lords reverſed the decree, and declared, that Mr. *Lowther* became entitled to a general fine on the death of the Duke.

How much may be demanded as a Fine.

§ 27. With reſpect to the quantum or amount of fines, it is probable, that when fines were firſt introduced, they were at the mere will and diſcretion of the lords of manors. But the benevolence of ſome lords eſtabliſhed fines certain in ſome manors, while they continued uncertain in others: nor does it appear that the courts of law interpoſed before the reign of Queen *Elizabeth*, to moderate the exerciſe of the lord's right to demand whatever he pleaſed, where the cuſtom had left the amount of the fine uncertain.

§ 28. It was reſolved by the Court of King's Bench, in 42 and 43 *Eliz.*, that if the fines of copyholders upon admittance be uncertain, yet the lord cannot demand or exact exceſſive or unreaſonable fines; and that, if he does, the copyholder may, by law, refuſe to pay them; and it ſhall be determined by the opinion of the juſtices, before whom the matter is depending, either upon demurrer, or upon evidence to a jury, upon confeſſion or proof of the yearly value of the land, whether the fine demanded was reaſonable or not. For, if the lord might aſſeſs exceſſive fines at his pleaſure, all the eſtates of copyholders would be, at the will of the lord, defeated or deſtroyed.

Hobart v. Hammond, 4 Rep. 27 *b.*

§ 29. A lord of a manor demanded a fine of 5 *l.* 6 *s.* 8 *d.* for an admittance upon a ſurrender to a cottage and an acre of paſture, which was let at a rack-rent of 53 *s.* a year. It was reſolved, 1ſt, That although the fine be uncertain and arbitrary, yet it ought to be *ſecundum arbitrium boni viri*, that is, reaſonable, and not exceſſive; for *exceſſus in re qualibet jure reprobatur communi.* The common law forbids any unreaſonable diſtreſs; and, if an exceſſive or unreaſonable amercement be impoſed in any court baron, or other court which is not of record, the party ſhall have moderate *miſericordia.* 2d, That if the lord and tenant cannot agree about the fine, and the lord demands more than a reaſonable fine, the ſame ſhall be decided and adjudged by the court, in which any ſuit ſhall be brought on account of the denial of ſuch fine. 3d, That the fine demanded in this caſe was unreaſonable,

Willowe's caſe, 13 Rep. 1.

for this was not a voluntary grant, as where the copyholder has but an eſtate for life.

Dong. Rep. 726. n.

§ 30. Thus ſtood the doctrine, the fine was to be aſſeſſed by the lord; and whether it was a reaſonable one or not, was a queſtion for the conſideration of the court and jury. And it would be obviouſly ſubject to much fluctuation and uncertainty, to prove upon a trial the annual improved value of land, and then to calculate how much of that value ſhould be paid for a fine, was likely to be attended with ſo much diſſatisfaction, that recourſe would frequently be had to the Court of Chancery, which had always taken upon itſelf, without a jury, to determine what ſhould be a reaſonable fine.

Middleton v. Jackſon, Rep. in Cha. 18. Popham v. Lancaſter, Id. 51.

§ 31. Lord Keeper *Coventry*, in 5 *Cha.* r., and again in the 12th of the ſame reign, held, that one year's improved value was a reaſonable fine; guarding the decree, that one year's value ſhould not be counted a fine certain, but referable to the diſcretion of the court, whether it was reaſonable or not, and that the payment was then directed, becauſe it was reaſonable.

Morgan v. Scudamore, Id. p. 2. 70.

§ 32. In 29 *Car.* 2. Lord *Nottingham* held, that two years value was a reaſonable fine; and at the time of this determination, two years value was not a much higher payment, than one year's value had been at the time of Lord *Coventry*'s determination: the intereſt of money had been reduced, and, from that and other cauſes, the value of land had riſen. One year's value might

might be near as large an aliquot part of the ſelling price of land in 5 *Cha.* 1. as two year's value at the time of Lord *Nottingham*'s decree.

§ 33. From that time to the preſent, the idea of two years value being a reaſonable fine, in the caſe of a fine arbitrary, or, in a more proper phraſe, arbitrable, has prevailed uniformly: and the adhering to this rule has been a matter of great convenience, though it cannot be ſaid to be a matter of ſtrict juſtice. Two years value, the intereſt being at 6 *per cent.*, as at the time of Lord *Nottingham*'s determination, is a much larger proportion of the ſelling price of a copyhold eſtate than the ſame number of years purchaſe, the intereſt of money being at 4 or 5 *per cent.* But, to follow the variations of price, would create confuſion in this property, would occaſion a deprivation of it, and it is not the true intereſt of the copyholder. Public convenience, therefore, that great ſource of law and juſtice, has eſtabliſhed the authority of the rule laid down by Lord *Nottingham.* It ſeems, therefore, much better for the copyhold tenants, and for the public advantage, as there is a great deal of that property in the kingdom, that the fine to be paid upon the renewal of the copyhold eſtate ſhould be ſtrictly kept to that ſum, which has ſubſiſted now above a century, namely, two years improved value.

No more than Two Years Value can be required.

Dong. Rep. 726. n.

§ 34. It has been determined in a modern caſe, that no deduction is to be made out of the two years full improved value of a copyhold, on account of the land tax. But quit rents are always deducted.

Grant v. Aſtle, Dong. R. 724. n.

Halton v. Haſſell, Stra. 1042.

§ 35. The fine ſhall be eſtimated according to the improved yearly value, not according to the rent under a leaſe ſubſiſting by licence of the lord.

Fines muſt be aſſeſſed ſeverally.

4 Rep. 28 *a.* Cro. Eliz. 779. Grant v. Aſtle, Ante.

§ 36. Where a perſon holds ſeveral tenements by copy of court roll, of the ſame manor, in conſideration of ſeveral ſervices, the lord muſt aſſeſs and demand the fines ſeverally, for every tenement which is ſo held. For the tenant may refuſe to pay the fine for one tenement, and yet pay the fines for the others: and to every ſeveral tenure, there is a ſeveral condition in law *tacitè* annexed.

When Fines are payable.

Dalton v. Hammond, Cro. Eliz. 779. 4 Rep. 28 *a.* Gilb. Ten. 218.

§ 37. Where the fine is certain, the tenant is bound to pay it immediately upon his admittance. But where the fine is uncertain, the copyholder is not bound to pay it immediately, becauſe, as he cannot tell what fine the lord will aſſeſs, it would be impoſſible for him to provide himſelf with the preciſe ſum; and therefore he will be allowed a convenient time to pay it, unleſs the lord ſhall appoint a certain day for its payment.

Remedies for recovering Fines.

Doug. R. 727. n.

Ten. 292. 3 P. Wms. 151.

§ 38. The lord may bring an action of debt againſt his copyholder for the recovery of his fine. But, if a copyholder in fee dies, and his heir waives the poſſeſſion, it ſeems doubtful whether the lord can bring an action of debt againſt the heir for his fine. Lord Chief Baron *Gilbert* was of opinion, that the heir may waive the poſſeſſion of the lands in the lord's court; and if he may do ſo, then no fine is due.

§ 39. If

§ 39. If a copyholder be admitted, and, before payment of the fine, the lord dies, and the manor deſcends to his ſon and heir, who alſo dies, the executor of the ſon may maintain an action of *aſſumpſit* againſt the copyholder, to recover the fine; whether it be a fine certain, or at the will of the lord. Shuttleworth v Garnet, 3 Mod. 240.

§ 40. By the ſtatute 9 *Geo.* 1. c. 29., reciting that doubts had ariſen in the law reſpecting the power of lords of manors to ſeiſe copyhold lands, parcel of their manors, on the neglect or refuſal of perſons to come in and be admitted tenants, it is enacted, that feme coverts and infants may be admitted to copyhold eſtates by their attorney or guardian; and, in default of appearance, the lord may appoint a guardian. That upon every ſuch admittance, the fine may be demanded by a note in writing to be left with ſuch infant or feme covert; and if the fine be not paid within three months after ſuch demand, the lord may enter on the copyhold, and receive the profits thereof, until he is paid his fine and coſts, &c. And by the fourth ſection it is enacted, that guardians and huſbands paying ſuch fines, ſhall reimburſe themſelves out of the rents and profits of the copyholds, notwithſtanding the deaths of ſuch infants and feme coverts.

§ 41. Beſides a fine, there is alſo a cuſtom in many manors, that, upon the death of every tenant who was poſſeſſed of a copyhold eſtate, the lord ſhall be entitled to the beſt beaſt, or *averium*, which belonged to ſuch tenant. In ſome manors, it is the beſt chattel; under which, a jewel or piece of plate is included. But it is Of Heriots. Co. Cop. ſ. 24.

always a perſonal chattel, which, immediately on the death of the tenant, being aſcertained by the option of the lord, becomes veſted in him as his property; and is no charge on the lands, but merely on the goods and chattels of the tenant.

Parker v. Combleford, Cro. Eliz. 725.

§ 42. A cuſtom that the lord of a manor ſhall have the beſt beaſt of every perſon who dies within the manor, whether he be a copyholder or not, is a void cuſtom. For it cannot have a lawful beginning between the lord and a ſtranger.

2 Ld. Raym. 994.

§ 43. The lord is only entitled to a heriot, on the death of the tenant, who has an intereſt in the copyhold; and not on the death of perſons for whoſe lives a copyhold is granted.

§ 44. Although the copyholder be ouſted or diſſeiſed, yet the lord will be entitled to a heriot on his death; for he was tenant in right, notwithſtanding the ouſter or diſſeiſin.

Norrice v. Norrice, 2 Roll. Ab. 72. March R. 23.

§ 45. A copyholder for life, where the cuſtom was, that if the tenant died ſeiſed, a heriot ſhould be paid, was diſſeiſed or ouſted and died; the lord having firſt granted the ſeignory to *A.* for 99 years, if the tenant ſhould ſo long live, remainder to *B.* for 4000 years. Two queſtions were made: 1ſt, Whether the heriot ſhould be paid, becauſe the copyholder did not die ſeiſed: and as to this, the court held clearly, that a heriot was due and payable; for, notwithſtanding the ouſter and diſſeiſin, he ſtill continued legal tenant, and ſuch

ſuch diſſeiſin might have been by combination to defeat the lord of the heriot. 2dly, To whom the heriot ſhould be paid: and as to this the court held clearly, that the remainder-man for 4000 years could have no right to it, becauſe the copyholder was never his tenant; and as to the grantee for 99 years, it was doubted, becauſe the moment the copyholder died, his eſtate was determined.

§ 46. A heriot is only due on the death of the legal tenant; not on the death of a perſon entitled to an equitable eſtate in a copyhold. Trin. Coll v. Brown, 1 Vern. 441.

§ 47. If a copyholder for life, on whoſe death the lord is entitled to heriot, becomes a bankrupt, and the copyhold is aſſigned for the benefit of the creditors, this tranſmutation of the tenant by act of parliament ſhall not work a prejudice to the lord, who ſhall have a heriot on the death of the copyholder, but not on the death of the aſſignee. 2 Ld. Ray. 1002.

§ 48. No heriot is due on the death of a married woman, becauſe a married woman can have no chattels. Anon. 4 Leon. 239. Keilw. 84.

§ 49. In many manors there is a cuſtomary compoſition, as 10 or 20 ſhillings in lieu of a heriot, by which the lord and tenant are both bound; provided it be an indiſputably ancient cuſtom. But a new compoſition of this kind will not bind the heirs or repreſentatives of either party; for that amounts to the creation of a new cuſtom, which cannot be now done.

8 Rep. 106 *b.*

§ 50. If a heriot be due, by the cuſtom of the manor, upon the death of the tenant, and the lord purchaſes part of the tenancy; ſuch purchaſe will not extinguiſh the lord's right to a heriot; for the tenant is ſtill within the lord's homage.

Snag v. Fox, Palm. 343.

§ 51. Where a copyholder is bound to pay a heriot, and he conveys part of his copyhold to one perſon, and part to another, the heriot will be multiplied.

Bro. Ab. Tit. Heriots, 2, 3. 2 Inſt. 131. Auſtin v. Bennett, 1 Salk. 356.

§ 52. In the caſe of heriot cuſtom, the lord may ſeize the beſt beaſt of the tenant, or whatever is due as a heriot, wherever he can find it, either within the manor or out of it, even on the highway.

Parker v. Gage, 1 Show. R. 81.

§ 53. In trover, on not guilty before Lord *Holt*, the queſtion being about a horſe ſeized for a heriot, it was held, that either heriot ſervice, or heriot cuſtom, is ſeizable off the manor; becauſe it lies in prender; and heriot ſervice is founded on ancient tenure.

TITLE X.

COPYHOLD.

CHAP. V.

Of the Forfeiture of Copyholds.

§ 2. *Attainder of Treaſon or Felony.*
5. *Alienation contrary to the Cuſtom.*
8. *Making Leaſes contrary to the Cuſtom.*
11. *A Covenant that a Perſon ſhall enjoy is no Forfeiture.*
15. *Waſte.*
18. *Diſclaiming Tenure.*
20. *Refuſal to perform Services.*
25. *Non-appearance of the Heir to be admitted.*
31. *Non-appearance of a Surrenderee.*
32. *Non-appearance of a Deviſee.*
33. *Refuſal to pay Fines.*
36. *Refuſal to pay Rent.*
39. *Who may forfeit.*
41. *Extent of Forfeiture.*
45. *Where Preſentment is neceſſary.*
46. *What diſpenſes with a Forfeiture.*
52. *Who ſhall take Advantage of a Forfeiture.*
55. *Where Equity relieves.*
60. *Where Relief has been refuſed.*

Section 1.

AS copyhold eſtates were originally held by the loweſt and moſt abject vaſſals, the marks of feudal domination continue much ſtronger in this tenure than in any other. So that copyholds are not only ſubject to the ſame forfeitures as eſtates held in ſocage, but alſo to a variety of other forfeitures incident to this tenure.

§ 2. If a copyholder is attainted of high treaſon, his eſtates is forfeited to the lord of the manor; not to

Attainder of Treaſon or Felony.

Berneford v. Packinton, 1 Leon. 1. Haw. P. C. c. 49. f. 7. c. 15. f. 67. Skin. Rep. 8.

to the king, except by the expreſs words of an act of parliament. In the ſame manner, if a copyholder is attainted of felony, his eſtate becomes forfeited by the cuſtom to the lord of the manor.

§ 3. A perſon to whom a copyhold is deviſed, but who is convicted of felony and hanged before admittance, does not forfeit ſuch copyhold.

Roe v. Hicks, 2 Wilſ. 13.

§ 4. Mr. *Jeffcreys* deviſed a copyhold to his neice, *Elizabeth Jeffereys*, who was tried and convicted for the murder of the teſtator, and was afterwards hanged. Miſs *Jeffereys* was not admitted, nor ever did any act to ſhew that ſhe was the lord's tenant. The court was of opinion, that Miſs *Jeffereys* had no legal intereſt in the eſtate, ſo could have no legal remedy to recover it; and having no legal *jus in re*, nor *ad rem*, could not forfeit any thing.

Alienation contrary to the Cuſtom.

§ 5. Copyholders can only alien their eſtates in the manner preſcribed by the cuſtom of the manor in which they are ſituated; and any other mode of alienation will operate as a forfeiture. Thus, ſays *Littleton*, (f. 74.) if a copyholder aliens by deed, it is a forfeiture; for a copyholder being only a tenant at will, ſuch an act would amount to a determination of his will.

Gilb. Ten. 157.

1 Inſt. 59 *a*. n. 3. Co. Sup. f. 10.

§ 6. Lord *Coke* ſays, that if a copyholder makes a charter of feoffment, or a deed of demiſe, for life, without giving livery of ſeiſin, it is no forfeiture; becauſe nothing paſſes.

According

According to *Roll*, though livery is not made, yet the feoffment is a forfeiture, if there be a letter of attorney to deliver ſeiſin; becauſe then the feoffee may at any time perfect the conveyance. And he thinks that Lord *Coke* ought to be underſtood with this diſtinction. 1 Roll. Ab. 508. p. 12. & 13.

Mr. *Hargrave* does not acquieſce in *Roll*'s doctrine; "For (ſays he) the criterion of forfeiture of a copyhold by alienation ſeems to be, the actual paſſing of an unlawful eſtate, to the lord's prejudice; and in the caſe of the feoffment, no intereſt can paſs until livery, nor is it ſtrictly true that the feoffee may at any time perfect the conveyance; for it is poſſible that, before livery, the feoffor may revoke the power of attorney, or the attorney may die, or refuſe to execute the authority.

§ 7. It is alſo ſaid in *Roll*'s Abridgement, that if a copyholder bargains and ſells his copyhold to another in fee, it is a forfeiture, although the deed be not inrolled. But this doctrine has been frequently denied to be law; for a copyhold eſtate, not being within the Statute of Uſes, does not paſs by ſuch a conveyance. 1 Roll. Ab. 508. p. 11. Co. Sup. f. 10.

§ 8. A leaſe for years of copyhold lands by indenture, or by parol, is a forfeiture; unleſs there be an expreſs cuſtom to warrant it, and that cuſtom muſt be time out of mind. Making Leaſes contrary to the Cuſtom. Jackman v. Hoddeſton, Cro. Eliz. 351.

§ 9. By

4 Rep. 26 *a.* Luttrell v. Weſtover, 1 Roll. Ab. 507. p. 8. Cro. Ja. 308.

§ 9. By the general cuſtom of all manors, a copyholder may make a leaſe for one year. But where a copyholder leaſed his copyhold for one year, and ſo from year to year, during the life of the leſſor, reſerving to the leſſor in every year the 25th day of *March*; it was held to be a forfeiture; for it was a leaſe for two years at leaſt, reſerving one day, ſo that a greater eſtate than for one year paſſed in intereſt; and the reſerving a day in every year was but a ſhift to avoid the forfeiture.

Mat hews v. Wheaton, 1 Roll. Ab. 508. pl. 10. Cro. Car. 233. Gilb. Ten. 232.

§ 10. A copyholder agreed to make three ſeveral leaſes by indenture, one to commence after another, there being two days between the end of the firſt and the commencement of the ſecond, and ſo between the ſecond and the third; and made them accordingly, and ſealed them at the ſame time: this was held to be a forfeiture; for it was an apparent fraud, and a greater eſtate than for one year paſſed preſently.

A covenant that a Perſon ſhall enjoy is no Forfeiture. Mountague's caſe, Cro. Ja. 301.

§ 11. Where a copyholder made a leaſe for a year only, according to the cuſtom, and covenanted that, after the end of the year, the leſſee ſhould have and enjoy the ſame lands for another year, and ſo *de anno in annum* for ten years, it was held by *Yelverton* to be no ſuch leaſe as would make a forfeiture; becauſe the leſſee had a lawful eſtate but for one year only; and the court agreed with him.

Ten. 233.

§ 12. Lord Chief Baron *Gilbert* ſeems, in the firſt inſtance, to doubt this caſe, for "the words covenant "and

" and grant make a leaſe," &c. He afterwards, however, ſays; " But, in another caſe, it was held that " theſe words by conſtruction might make a leaſe, " where the lands might be let; but otherwiſe, where " the lands could not be let: which diſtinction ſeems " very reaſonable, for the words themſelves do not " import a leaſe; and it would be a very injurious " conſtruction to make them a leaſe, and ſo a forfei- " ture, when they only import of themſelves a cove- " nant."

It is ſaid in *Bacon's Abridgement*, Tit. Leaſe, (I. 6.), that in ſuch a covenant it would be better if it were worded, *to permit and ſuffer* the leſſee to have, hold, and enjoy the lands in ſuch manner; for a covenant in that form, even of freehold lands, will not amount to an immediate leaſe, becauſe the words, *permit and ſuffer*, prove that the eſtate is ſtill to continue in him from whom the permiſſion is to come; for, if any eſtate thereby paſſed to the covenantee, he might hold and enjoy it without any permiſſion from the covenantor; and, therefore, in ſuch caſe, the covenantee hath only the bare covenant for his ſecurity of enjoyment, without any actual eſtate made over to him.

§ 13. Mr. *Hargrave* appears to acquieſce in this doctrine. " Becauſe, (ſays he), though in general a " covenant amounts to a leaſe, yet it ſeems harſh to " give ſuch a conſtruction, where a leaſe amounts to a " forfeiture, and the intention of the parties may have " effect by way of agreement; and, in a modern caſe, " it

1 Inſt. 59 *a*. n. 4.

Doe v. Clare, 2 Term Rep. 739.

" it was ſettled, that an executory agreement for a " leaſe of a copyhold eſtate ſhall not operate as a forfeiture.

1 Roll. Ab. 508. p. 14.

§ 14. A leaſe made by licence from the lord is no forfeiture; and, in ſuch a caſe, the leſſee may aſſign over his term, or make an under leaſe, without any new licence; for the intereſt of the lord was diſcharged by the licence.

Waſte.

1 Inſt. 63 *a.* Gilb. Ten. 235. Ante, ch. 3.

§ 15. Every ſpecies of waſte, whether voluntary or permiſſive, which is not warranted by the cuſtoms of the manor, will operate as a forfeituee of a copyhold eſtate.

4 Rep. 27 *a.*

§ 16. If a ſtranger commits waſte upon a copyhold eſtate, without the aſſent of the copyholder himſelf, it will not operate as a forfeiture. But if the huſband of a copyholder commits waſte, it will amount to a forfeiture.

Att. Gen. v. Vincent. 2 Ab. Eq. 378.

§ 17. A copyholder cut down more timber than he could juſtify, and a bill being brought againſt him for a diſcovery, he demurred, becauſe it would ſubject him to a forfeiture as being waſte; and the demurrer was allowed.

Diſclaiming Tenure.

Co. Cop. ſ. 57.

§ 18. If a copyholder diſclaims holding of his lord, or ſwears in court that he is not the lord's copyholder; or, if the ſteward ſhews the court roll to the copyholder, to prove that his land is held by copy, and the copyholder

copyholder aſſerts his eſtate to be freehold, and ſhews a deed, under which he pretends to have a freehold, and tears the court roll, theſe acts will operate as a forfeiture.

§ 19. But if a copyholder, in preſence of the court, ſpeaks irreverent words of the lord, as, that he exacts and extorts unreaſonable fines, and undue ſervices; this is fineable only, and no forfeiture. So, if a copyholder ſays in court, that he will deviſe means to be no longer the lord's copyholder, this is neither cauſe of fine or forfeiture: for perhaps the means he intended were lawful, by conveying away his copyhold. Id.

§ 20. Copyhold eſtates are alſo ſubject to forfeiture by neglect or refuſal of the tenant, to perform the duties and ſervices required by the cuſtom of the manor. Thus, if a copyholder neglects to appear at the court of the manor after ſummons, he will forfeit his eſtate. But to make this a forfeiture, there muſt be a particular warning to each tenant, or a general notice within the pariſh: after which it is a forfeiture, without any expreſs refuſal; for, unleſs the copyholders attend, no court can be held; which would be highly prejudicial, not only to the lord, but alſo to the tenants. Refuſal to perform the Services. 1 Roll. Ab. 506. Gilb. Ten. 229. Co. Sup. f. 10.

§ 21. A copyholder neglected to do his ſuit and ſervice for the ſpace of three years together. The queſtion was, whether this was a ſufficient cauſe of forfeiture. It was ſaid by the court, that it was no cauſe of forfeiture, if a warning was not given by the lord of Hammond v. Wennibank, 3 Bulſ. 368. Co. Sup. f. 10.

the time when his court was to be held, and notice thereof given to the copyholder himſelf. And that the withdrawing of his ſuit by a copyholder is only fineable: but if he denies to do his ſuit and ſervice, then it is a forfeiture.

Gilb. Ten. 230. Lat. R. 14. 113.

§ 22. Where the lord required the copyholder to do his ſervices, and he anſwered, if they were due he would do them, but it ſhould be tried at law firſt whether they were due or not. This was held not to be a forfeiture.

Co.Cop.f.57. Gilb. Ten. 229.

§ 23. If a copyholder is confined by ſickneſs, or is afraid of being arreſted, or is a bankrupt, he will be excuſed from attending the lord's court.

Co.Cop.f.57. Dyer, 211 *b.* Gilb. Ten. 231.

§ 24. When the copyholders are aſſembled in the lord's court, they are bound to do the proper buſineſs of the court; ſo that, if a jury or homage refuſe to preſent the articles upon oath, it will amount to a forfeiture.

Non-appearance of the Heir to be admitted.

Gilb. Ten. 231.

§ 25. Where copyholds are deſcendible, the heir is bound, on the death of his anceſtor, to come to the lord's court, and require to be admitted. If he neglects to appear within the time preſcribed by the cuſtom, a proclamation is made for him to come in, and be admitted; if he does not then appear, farther proclamations are made at the two or three next courts, according to the cuſtom of the manor; and if the heir does not appear immediately after the laſt proclamation, the lord may ſeiſe the copyhold as forfeited.

§ 26. If

§ 26. If the heir of a copyholder is beyond ſea, at the time of his anceſtor's death, or if he is within age, *non compos mentis*, or in priſon, his non-appearance at the lord's court to be admitted, will not amount to a forfeiture. Gilb. Ten. 231.

§ 27. The cuſtom of a manor was, that thoſe who claimed copyholds by deſcent, ought to come at the firſt, ſecond, or third court, upon proclamations made, to take up their eſtates, or elſe they ſhould be forfeited. A tenant of the manor having iſſue inheritable by the cuſtom, died, ſuch iſſue being at that time beyond ſea, the proclamations all paſſed, and the heir did not return in two years; but, upon his return, he prayed to be admitted to the copyhold, and proffered the lord his fine in court, which the lord refuſed to accept, or to admit the heir, but ſeized the land as forfeited. Lechford's caſe, 8 Rep. 99. Co. Sup. f. 19. Underhill v. Kelſey, Cro. Ja. 226. S. P.

It was adjudged that this was no cauſe of forfeiture, becauſe the heir was beyond ſea at the time of the proclamations, and the lord was at no prejudice, for he had taken all the profits of the land in the mean time.

§ 28. It ſeems to be now held, that there muſt be a particular cuſtom to warrant the forfeiture of a copyhold, by the mere non-appearance of the heir to be admitted; and that, by the general cuſtom, the lord is only authorized, in a caſe of this nature, to ſeize the land, until the tenant comes in to be admitted. It is alſo required, that all the proceedings ſhould be ſtrictly conformable to the cuſtoms of the manor, and the proclamations Ld. Saliſbury's caſe, 1 Keb. 287.

clamations proved *viva voce*, and not by the court rolls only, otherwiſe no forfeiture will incur.

Roe v. Helier, 3 Term Rep. 162.

§ 29. At a court leet and court baron, holden for the manor of *Featherſtone* in 1785, the homage preſented the death of Sir *S. Helier*, and an entry of a proclamation on the rolls was made as follows: "At "this court public proclamation was made for the firſt "time for the heir of Sir *S. Helier* Knight, deceaſed, "to come into court, and be admitted tenant to all "and ſingular the ſeveral meſſuages, &c. within the "precincts of this manor, whereof the ſaid Sir *S.* "*Helier* died ſeiſed, or elſe the ſame would be ſeiſed "by the lord of the ſaid manor, for want of a tenant. "But nobody came who ſhewed any title to the ſame; "therefore ſuch default, and this proclamation, are "recorded." Two other ſimilar proclamations were made at two ſubſequent courts, &c. By an entry on the rolls of a ſmall court and court baron, holden on the 14th *January* 1786, it appeared as follows: "At "this court, a precept was iſſued by the ſteward of "the manor, and delivered to *W. B.* bailiff and officer "of the manor, directing him to ſeiſe into the hands "of the lord, all and ſingular the ſeveral copyhold "meſſuages, &c. which are ſituate and being in *Fea-* "*therſtone*, within the precincts of the manor, of which "Sir *S. Helier* died ſeiſed; and to return the precept "at the next court to be holden on," &c. By another entry on the rolls at a ſmall court and court baron holden on the 4th *February* 1786, it appeared as follows: "At this court, *W. B.* bailiff of this manor and "officer of this court, returned the precept, which

" iſſued and was delivered to him at the laſt court " holden for this manor, in every thing obeyed and " executed, to wit, that he had taken actual poſſeſſion " of, and ſeiſed into the hands of the lord of the ma- " nor, all thoſe four ſeveral copyhold meſſuages, *&c.* " whereof the ſaid Sir *S. Helier* died ſeiſed, as by the " ſaid precept he was commanded." At a ſubſequent court, the lord of the manor granted the ſaid copyhold premiſes to a ſtranger, his heirs and aſſigns for ever, according to the cuſtom of the ſaid manor, who was admitted tenant, and paid the lord a fine of 692 *l.* and made his fealty.

The heirs at law of Sir *S. Helier* did not apply to be admitted until the year 1788, when they were refuſed; and, in conſequence thereof, brought their ejectment; and a verdict was found for the plaintiffs, ſubject to the opinion of the court upon the above caſe.

After ſeveral arguments, Lord Chief Juſtice *Kenyon* is reported to have ſaid; " The firſt point made, is on " the ſuppoſed forfeiture by reaſon of the heirs of Sir " *S. Helier* neglecting to come to the lord's court to " be admitted as his tenants, and to ſatisfy the lord's " claim of the fruits of his tenure. I cannot but ob- " ſerve, that the intereſt of the lord of this manor " was not very deeply concerned in the heirs not com- " ing to be admitted, becauſe it is ſtated, that no fine " was due on admiſſion. The caſe does not, indeed, " ſtate that he had a minute intereſt, namely, a relief " of 3 *s.* 6 *d.*; but, however ſmall this fruit of tenure " was, the lord undoubtedly had a right to it, and to

" ſee, by the inſpection of his court rolls, who were " his tenants. But the ſeverity of the law in theſe, " as in all other caſes of forfeiture, warrants the courts " in taking care that there is the greateſt accuracy " in the lord's proceeding. It is ſo in the caſe of out- " lawry, and all caſes of criminal proceedings. Se- " veral caſes were mentioned, which ſhew that a " general forfeiture of a copyhold eſtate, for not com- " ing in to be admitted, does not accrue, unleſs there " be a cuſtom to warrant it. In ſuch caſes, the lord " has only a right to enter into poſſeſſion, to ſatisfy " himſelf of the injury he ſuſtains for the want of a " tenant; he can only retain the poſſeſſion *quouſque.* " It ſeemed almoſt, and would have been properly " admitted in the argument, that if the lord, having " a right to ſeize *quouſque*, did ſeize abſolutely, there " was a defect in the ſeizure, which vitiated the whole. " But it was contended that there was no defect in the " ſeizure, for that the court might preſume, for any " thing that appeared to the contrary, that the lord " did only ſeize till a tenant came in to be admitted, " and that *omnia preſumuntur ſolemnitur eſſe acta.* But " I think that ſufficient appears in the caſe to ſhew, " that the ſeizure was irregular. A ſeizure generally " and undefined, muſt neceſſarily be a ſeizure of the " whole property; if it were not, what other line could " be drawn? So an entry upon an eſtate generally, " is an entry for the whole; and if it be for leſs, it " ſhould be ſo defined at the time. The caſe, how- " ever, does not reſt on this obſervation, for we col- " lect from ſubſequent acts of the lord, which are un- " ambiguous, what his idea was when he did ſeize,

" for

" for he made an abſolute grant of the whole of this " property to the defendant, his heirs and aſſigns for " ever, taking a fine of 692 *l.* on his admiſſion. Then " I am bound to ſay, that the lord entered as " for an abſolute forfeiture; and as this is a proceed- " ing where the moſt ſtrict regularity is neceſſary in " all its parts, we are warranted in ſaying, that here " was no ſeizure binding on the parties."

Judgment was given for the heirs of Sir *S. Helier.*

§ 30. The lord of a manor cannot bring a bill againſt copyholders to compel them to come in and be admitted tenants; for he has his remedy at law, by making proclamations ſo many court days. But if there be any confuſion ariſing from copyhold lands being blended together, the lord may bring a bill of diſcovery, to aſcertain the lands.

Clayton v. Cookes, 2 Atk. 449.

§ 31. By the particular cuſtom of ſome manors, the non-appearance of a perſon to be admitted, to whom a copyhold has been ſurrendered, amounts to a forfeiture. But, in a caſe of this kind, infancy will excuſe.

Non-appearance of a Surrenderee.

King v. Dillingſton, 3 Mod. 221. 1 Salk. 386.

§ 32. The non-appearance of a deviſee of a copyhold to be admitted, operates, in general, as a forfeiture. But where a copyhold was deviſed to ſix perſons on certain truſts; one offered to be admitted, and to pay his proportion of the fine, but the lord refuſed, unleſs he would pay the whole; the other five declined the truſt. The lord, after three proclama-

Non-appearance of a Deviſee.

Roe v. Hutton, 2 Wilſ. 168.

tions for the ſix truſtees to come in and be admitted, ſeized for a forfeiture. The court held, that the lord ought to have admitted the perſon who offered himſelf, and then he might have proceeded to recover his fine from the ſix deviſees, if it was due either by law, or the cuſtom of the manor; and that he had been too haſty in entering for a ſuppoſed forfeiture, before admittance. A ſeizure *quouſque* is, until ſomebody comes to be admitted; one comes and offers to be admitted: ſo it was clear the lord had no right to ſeize.

Refuſal to pay Fines.

Dalton v. Hammond, Cro. Eliz. 779.

§ 33. The refuſal of a copyholder to pay the fine due on his admittance, is a forfeiture, provided ſuch fine be certain: but where the fine is uncertain, the refuſal of the copyholder to pay the fine aſſeſſed by the lord, upon the ground that a greater fine is demanded than is warranted by the cuſtom, will not amount to a forfeiture.

Co. Cop. ſ. 57.

§ 34. If the fine be uncertain, though a reaſonable fine be aſſeſſed, yet as no man can provide for an uncertainty, the copyholder is not bound to pay it preſently upon demand, but ſhall have a convenient time to diſcharge it, if the lord does not appoint a day certain for its payment. But if it is not paid on the day appointed, the eſtate will be forfeited.

Gardiner v. Norman, Cro. Jac. 617.

Willowe's caſe, 13 Rep. 1.

§ 35. Though the fine aſſeſſed be reaſonable, yet the lord muſt appoint the time and place where it is to be paid; becauſe it ſtands upon a point of forfeiture of the eſtate; and the copyholder is not obliged to carry his fine always about him. But, as to a fine certain, the

the copyholder is obliged to pay it immediately upon admittance.

§ 36. If a copyholder is bound by his tenure to the payment of a certain yearly rent to the lord, and he refuſes to pay ſuch rent, he will forfeit his copyhold. Such a refuſal muſt, however, be founded on an idea, that the lord has no right to the rent, which implies a diſclaimer of the tenure. For if the copyholder admits the lord's claim to the rent, but ſays he has no money, or makes any other excuſe of that ſort, it is no forfeiture.

Refuſal to pay Rent.
Co. Cop. f. 57.
Gilb. Ten. 225.

§ 37. If a copyholder be abſent when the lord demands the rent, and no perſon is there to pay it, which is a refuſal in law, yet the court doubted whether it was a forfeiture, as it did not amount to a voluntary refuſal: and two of the judges ſaid, there ought to be a demand from the perſon of the copyholder to make a forfeiture.

Criſp v. Freer, Cro. Eliz. 505.
Hob. 135.
Gilb. Ten. 225.

§ 38. Where the eſtate of a lord of a manor ceaſes by limitation of a uſe, and is thereby transferred to another perſon, who demands rent of the copyholder, and he refuſes to pay it, this is no forfeiture, without notice given to the copyholder of the alteration of the uſe and eſtate.

8 Rep. 92 *a.*

§ 39. With reſpect to the perſons who are capable of committing or incurring a forfeiture of copyholds, Lord *Coke* ſays, that none but perſons of ſound mind and underſtanding can forfeit; ſo that no act done by

Who may forfeit.
Co. Cop. f. 59.

an idiot, lunatic, or infane perſon, will operate as a forfeiture of a copyhold.

§ 40. By the ſtatute 9 *Geo.* 1. c. 29. ſ. 5., it is enacted, that no infant or feme covert ſhall forfeit any copyhold meſſuages, *&c.* for their neglect or refuſal to come to any court or courts to be kept for any manor whereof ſuch meſſuages, *&c.* are parcel, and to be admitted thereto; nor for the omiſſion, denial, or refuſal to pay any fine impoſed or ſet on their admittances. § 6. Provided, that if the fines ſo impoſed ſhall not be warranted by the cuſtom of the manor, or ſhall be unlawful, that then ſuch infant or feme covert ſhall be at liberty to controvert the legality of ſuch fine or fines.

Extent of Forfeiture.

Taverner v. Cromwell, 4 Rep. 27 *a.* Gilb. Ten. 317.

§ 41. A forfeiture, in general, only extends to the copyhold in which the act has been done. For if a copyholder be ſeiſed of black-acre by the rent of 3 *d.*, white-acre by the rent of 4 *d.*, and green-acre by the rent of 6 *d.*, and commits waſte in black-acre, it is thereby forfeited: but there is no forfeiture of white-acre or green-acre. For although they are all in one and the ſame hand, yet every acre is held ſeverally; and to every acre there is a ſeveral condition in law *tacité* annexed.

Id.

§ 42. It was alſo reſolved in the preceding caſe, that if a copyholder who holds three acres ſeverally, ſurrenders them to the uſe of *A.* and his heirs, and the lord admits *A.* accordingly, *tenendum per antiqua ſervitia inde prius debita et jure conſueta*, or to ſuch effect, and after *A.* commits a forfeiture in black-acre, he ſhall

ſhall forfeit that only, and none of the others; for the *tenendum* continues the ſeveral tenures.

§ 43. So, if ſeveral copyholds eſcheat to the lord, and he regrants them to another, *tenendum per antiqua ſervitia, &c.* they ſhall be held ſeverally, as they were before the eſcheat. Id.

§ 44. It ſhould, however, be obſerved, that waſte, committed in any part of a copyhold, is a forfeiture of all the lands held by the ſame tenure with that part; for the condition in law, which is annexed to the whole eſtate, is broken. 3 Keb. 641. Gilb. Ten. 217. 246.

§ 45. It is ſaid by Lord *Coke*, that a preſentment by the homage is neceſſary to make a forfeiture, in thoſe caſes where the lord cannot be preſumed to have notice of himſelf; as where the tenant is convicted of treaſon or felony, or makes an alienation contrary to the cuſtom. But it appears to have been reſolved in 37 *Eliz.* that preſentment is not abſolutely neceſſary, but for the lord's better inſtruction of his title; and that the lord may take advantage of a forfeiture before preſentment. It is, however, ſafer to get all forfeitures preſented; and if there is a particular cuſtom, it muſt be purſued. Where Preſentment is neceſſary. Co. Cop. f. 57. Gilb. Ten. 246. Cro. Eliz. 499.

§ 46. Forfeitures may, in many caſes, be diſpenſed with, by the act of the lord. Thus, if the copyholder has broken the cuſtoms of the manor, by committing waſte, refuſing to perform his ſervices, or to pay his rent, the forfeitures ariſing from theſe acts may be diſpenſed What diſpenſes with a Forfeiture. Co. Cop. f. 61. Co. Sup. f. 11.

penſed with, by a ſubſequent acceptance of rent, or other act, by which the lord acknowledges the copyholder to be his tenant. But it is ſaid, that a forfeiture ariſing from any act done by the copyholder, which tends to the deſtruction of the copyhold, as if the copyholder makes a feoffment, cannot be diſpenſed with.

Milſax v. Baker, 1 Lev. 26.

§ 47. If a copyholder commits a forfeiture, and the lord *pro tempore* having a legal title, grants an admittance, it will operate as a diſpenſation of the forfeiture, not only as to himſelf, but as to the perſon in reverſion; for ſuch a new grant and admittance amounts to an entry for the forfeiture, and a new grant. But a lord by wrong, cannot, by ſuch an admittance, purge the forfeiture, ſo as to bind the rightful lord.

Paſcall v. Wood, 3 Keb. 641.

§ 48. A copyholder cut timber and ſold it, and died; the ſucceeding lord brought an ejectment: the defendant pleaded, that in treſpaſs brought by him, the lord (now plaintiff) juſtified for taking a heriot. And

Gilb. Ten. 247.

per curiam, juſtification for heriot ſervice, on ſeiſin of the anceſtor, is an acceptance of the heir, as tenant, and purges the forfeiture.

§ 49. It was ſaid, in this laſt caſe, that where there is an actual entry by the lord, in the life of the copyholder, for a forfeiture by him, no acceptance after will purge the forfeiture. And though it never was preſented by the homage, that is not material, it being a thing notorious.

§ 50. Where

§ 50. Where the lord is ignorant of the act, by which a copyhold has been forfeited, no act of his will operate so as to dispense with the forfeiture.

§ 51. If the lord accepts of a surrender, not knowing at the time that a copyholder has committed a forfeiture, such an acceptance will not dispense with it.

Mathews v. Whetton, Cro. Car. 233.

§ 52. In all cases of forfeiture of copyholds, the lord is the only person who shall take advantage of such forfeiture; and even a lessee for years of a manor shall take advantage of a forfeiture committed by a copyholder of the manor; for he is *dominus pro tempore*.

Who shall take Advantage of a Forfeiture.

1 Roll. Ab. 509.

§ 53. Thus, if a copyholder for life, with a remainder over for life, commits a forfeiture, the lord of the manor, and not the person in remainder, shall enter for the forfeiture; and shall retain it during the life of the person who committed the forfeiture.

9 Rep. 107 *a*. 1 Salk. 188.

§ 54. In all cases of forfeiture for treason or felony by a copyholder, the lord becomes entitled to the copyhold, and not the king, unless there is a special act of parliament for that purpose; and where by the statute 12 *Cha.* 2. of Regicides, the forfeiture was given to the king of all lands, tenements, and hereditaments, *&c.* Lord *Hale* said, that copyholds were not included; for if a copyhold was forfeited by this act, it would be destroyed, and pass by letters patent, and not by surrender.

Duke of York v. Marsham, Hard. 432.

§ 55. There

Where Equity relieves.

§ 55. There are many caſes in which courts of equity have interpoſed to moderate the rigor of copyhold cuſtoms, and to relieve againſt unreaſonable forfeitures.

Thomas v. Porter, 1 Cha. Ca. 95.

§ 56. A copyholder for life had committed a forfeiture, by cutting down timber trees, which was found ſo by a trial and verdict at law; and the lord entered, and admitted the defendant, who was the remainder-man. The copyholder exhibited his bill to be relieved againſt the forfeiture; offering, if it ſhould appear to be waſte, to make ſatisfaction. An iſſue was directed to try whether it was the primary intention of the copyholder, in cutting down the timber, to commit waſte; and it being found for the plaintiff, it was decreed, he ſhould be relieved, and that the defendant, the remainder-man, ſhould deliver up the poſſeſſion to the plaintiff, and account for the meſne profits.

Naſh v. Earl of Derby, 2 Vern. 537.

§ 57. A perſon, having two copyholds held of the ſame manor, cut down timber in the one, and employed it in repairing the other; pretending that he was authorized by the cuſtom of the manor, the timber being aſſigned and ſet out by two of the cuſtomary tenants. An ejectment was brought, upon the ſuppoſition that this was voluntary waſte, and conſequently a forfeiture.

Upon the firſt trial, a verdict was given againſt the lord; but upon a new trial, the jury found againſt the cuſtom.

A bill

A bill was then brought in Chancery to be relieved againſt the forfeiture. It was admitted, that by the cuſtom, when timber was wanting on one copyhold tenement, the lord, by his woodman or bailiff, might aſſign timber for repairs, on any of the other copyhold eſtates.

But here a cuſtom was ſet up, for two tenants to aſſign to a third, which might be prejudicial to the lord, and more timber might by that means be cut than was neceſſary; and thriving timber, when there might be found enough of that which was decaying, fit for repairs. It was, however, admitted, that the timber was of ſmall value, and all of it employed in the repairs of the copyhold. The Lord Keeper relieved the plaintiff againſt the forfeiture; but decreed him to pay the coſts of both the trials at law, and the coſts of this ſuit.

§ 58. The Court of Chancery relieved a quaker againſt a forfeiture which he had incurred by not doing ſuit and ſervice.

Cudmore v. Raven, 2 Vern. 664.

§ 59. The Court of Chancery will alſo relieve againſt an exceſſive fine. But a bill in Chancery cannot be brought by a ſingle copyholder to be relieved againſt an exceſſive fine, in regard the fine inſiſted to be exceſſive ought to be tried by a jury. But a bill might lie in order to ſettle a general fine to be paid by all the copyhold tenants of a manor, to prevent a multiplicity of ſuits.

Cowper v. Clerk, 3 P. Wms. 155.

§ 60. A court

Where Relief has been refuſed.

§ 60. A court of equity will not, however, interpoſe in caſes of this kind, unleſs there are equitable circumſtances which entitle the party who has committed the forfeiture to relief.

Cox v. Higford, 1 Ab. Eq. 121.

§ 61. The plaintiff brought his bill to be relieved againſt the forfeiture of his copyhold eſtate. The caſe appeared to be, that he had been guilty of the greateſt diſobedience poſſible to his lord; that after ſix ſeveral preſentments to repair, and an entry by the lord for the forfeiture, he brought an ejectment; and when, upon the trial, a rule was entered into by conſent, that upon payment of 4 *l.* to the lord for his coſts, (which were not a fourth part of the coſts he had put the lord to), and putting the eſtate into repair, he ſhould be admitted to it again; yet he never complied with the rule, nor made any offer of coſts to the lord; but inſtead of that, brought another ejectment, and was nonſuited; and after nine or ten years more, brought his bill. Upon theſe circumſtances, the Lord Keeper declared, he ought to have no relief, or, if he were to be relieved, yet it muſt be upon payment to the lord of all his coſts, and putting the eſtate into good repair, which would amount to more than his intereſt was worth, having only an eſtate for life: and diſmiſſed the bill, but with coſts.

The Lord Keeper likewiſe declared, that though this were a voluntary waſte, and forfeiture, (againſt which it was objected that this court never gave relief), yet he thought the rules of equity not ſo ſtrict, but that

that relief might be given even againſt voluntary waſte and forfeiture.

§ 62. A copyholder made leaſes not warranted by the cuſtom of the manor, and worked a quarry of ſtone from his freehold lands into the copyhold, without licence. Afterwards his ſon cut down trees, and incloſed ſome of the copyhold lands, notwithſtanding ſeveral repeated admonitions from the lord; who brought his ejectment, and had a verdict as for a forfeiture. On a bill brought for relief, Lord *Macclesfield* was clear of opinion, that there was no foundation for equity to interpoſe; that it would be to alter the nature of the tenure whereby copyholds ſubſiſted; that if this was a forfeiture at law, a court of equity had nothing to do with it; and that it was like the caſe of a feoffment or fine levied by a particular tenant, againſt which there could be no relief; that copyholders were but tenants at will, though it were according to the cuſtom of the manor; that this entirely differed from the caſe of a forfeiture for non-payment of rent, or of a fine, for there the eſtate was in the nature of a ſecurity for thoſe ſums, and the lord might be recompenſed in damages and coſts; that making a leaſe for years was a forfeiture, as it was a determination of his will, and though the lord ſhould refuſe to grant ſuch licence, yet the tenant has no remedy, nor would this court compel the lord to grant ſuch licence; that though theſe copyholds are mended by time, and are in the nature of an inheritance, yet ſtill the tenant is obliged to obſerve the law and cuſtom to which they are ſubject;

Peachey v. Somerſet, Prec. in Cha. 568. 2 Ab. Eq. 227.

ject; that theſe cuſtoms are in the nature of the limitation of an eſtate, which determines on the breach of them; and that unleſs there were ſome equitable circumſtances in the caſe the court could not interpoſe, as that would be to repeal and deſtroy the law.

Wirty v. Pemberton, 2 Ab. Eq. 279.

§ 63. The Court of Chancery will not interpoſe in the caſe of heriots; becauſe the cuſtom is unreaſonable, the loſs a family ſuſtains being thereby aggravated.

TITLE X.

COPYHOLD.

CHAP. VI.

Of the Extinguiſhment and Suſpenſion of Copyholds.

§ 2. *Surrender to the Lord.*
5. *Releaſe to the Lord.*
6. *Conveyance by the Lord.*
8. *Enfranchiſement.*
15. *When the Lands ceaſe to be demiſable.*
16. *Suſpenſion of Copyholds.*

Section 1.

ESTATES held by copy of court roll may be extinguiſhed in ſeveral ways; for whenever an eſtate of this kind ceaſes to be held by copy of court roll, according to the cuſtom of the manor, it is ſaid to be extinguiſhed and gone.

Surrender to the Lord.

§ 2. Thus, if a copyholder ſurrenders his eſtates to the lord, to the uſe of the lord, the copyhold is thereby extinguiſhed.

§ 3. It is, however, neceſſary in a caſe of this kind, that the lord, to whom the ſurrender is made, ſhould have a lawful eſtate in the manor. For a ſurrender by a copyholder, to a perſon who has acquired the manor by wrong, will not operate as an extinguiſhment of the copyhold.

Pitt v. Moore, 2 Show. 156.

§ 4. Error on a judgment in ejectment in the Court of Common Pleas, where, on a ſpecial verdict, the caſe was, that a biſhop, being diſſeiſed of a manor during *Cromwell's* uſurpation, a copyholder ſurrendered to the diſſeiſor, to diſpoſe of the copyhold as he pleaſed; after the reſtoration the biſhop entered, the copyholder brought his ejectment, and it was held in the Common Pleas, that the copyhold was not extinguiſhed, and that it was a void ſurrender.

Releaſe to the Lord.

Gilb. Ten. 300.

Wakeford's caſe, 1 Leon. 102.

Contra, Cro. Eliz. 21.

§ 5. If a copyholder releaſes to his lord, it will operate as an extinguiſhment of the copyhold. So, if the lord conveys away the freehold of a copyhold to a ſtranger, and the copyholder releaſes to the ſtranger, this will alſo extinguiſh the copyhold. For, although a releaſe cannot, in its own nature, paſs away a poſſeſſion, yet it may amount to a ſignification of the tenant's intention to hold the lands no longer; and the rule is, that every thing amounting to a determination of the copyholder's will, to hold no longer, extinguiſhes the copyhold. But, if a copyholder be ouſted and the lord of the manor diſſeiſed, and the copyholder releaſes to the diſſeiſor, *nihil operatur*.

Id.

Gilb. Ten. 301.

Conveyance by the Lord.

Lane's caſe, 2 Rep. 16 *b*. 4 Rep. 31 *a*.

§ 6. A conveyance of the land by the lord to the copyholder, for any eſtate of freehold, or even for a term of years, will extinguiſh the copyhold. For the eſtate of the copyholder being only at will, it becomes merged by the acceſſion of any greater eſtate.

Smith and Lane's caſe, 1 Leon. 170.

§ 7. If the lord demiſes the lands held by copy to a ſtranger, for years, and the ſtranger aſſigns over his

term to the copyholder, this will extinguiſh the copyhold; for both theſe intereſts cannot exiſt in the ſame perſon, *ſimul et ſemel*, and, conſequently, one of them muſt be determined, which, of neceſſity muſt be the cuſtomary eſtate; for the eſtate, at common law, cannot merge in that; and, when common law and cuſtom come together, and one or the other muſt neceſſarily ſtand, the common law ſhall be preferred, and take place before the cuſtom.

Hide v. Newport, Moo, 185.

§ 8. The next mode of extinguiſhing a copyhold eſtate is by enfranchiſement, by which the tenure is changed from baſe to free. This may be done by the lord's releaſing to the copyholder his ſignoral rights and ſervices, by which the tenure between the copyholder and the lord is extinguiſhed; and as the copyholder was tenant at will to the lord, which created a privity between them, the releaſe enlarges his eſtate, and gives him the freehold.

Enfranchiſement.

1 Inſt. 270 *b.* Vide Tit. 32.

§ 9. We have ſeen, that a conveyance of the freehold by the lord to the copyholder extinguiſhes the copyhold; for in fact it operates indirectly as an enfranchiſement, becauſe a freehold and copyhold tenure cannot ſubſiſt together, and conſequently the leſs worthy, that is the baſe tenure, becomes merged in the freehold.

Vide ſ. 6.

§ 10. Where a copyhold is enfranchiſed, either by a releaſe of the ſervices, or a conveyance of the freehold to the copyholder, the premiſes are ſevered from the manor, and will, for the future, be held of the

Lit. ſ. 146. 1 Inſt. 102 *b.*

lord paramount, by the ſame ſervices as thoſe by which they were held of the lord by whom they were enfranchiſed.

§ 11. When a copyhold eſtate is enfranchiſed, all ſervices and renders to which ſuch copyhold eſtate was ſubject previous to the enfranchiſement, become extinct and gone; nor can the lord of a manor, upon enfranchiſement, reſerve to himſelf the antient ſervices; for the tenant, in conſequence of the enfranchiſement, muſt hold of the ſuperior lord, and not of the lord who enfranchiſes.

Bradſhaw v. Lawſon, 4 Term Rep. 443.

§ 12. In an action of debt to recover 2 *s.* 6 *d.*, in which ſum the defendant was amerced for not attending a court baron, it appeared that the defendant was ſeiſed of 14 acres of land, which had formerly been held of the manor whereof the plaintiff was lord, by copy of court roll. But that in 18 *Jac.* 1., the then lord of the manor made a feoffment of the land to the then copyholder, reſerving a yearly rent, (which was ſtated in the deed to be the antient yearly rent), for all manner of ſuits, ſervices, and demands whatſoever.

The queſtion was, whether the owner of this land was bound to attend the plaintiff's court.

Lord *Kenyon* obſerved, that the principal queſtion was ſettled by the ſtatute of *quia emptores*, 18 *Edw.* 1., for after that ſtatute, the lord could not by any deed reſerve the old ſervices, when he conveyed away the eſtate in reſpect of which thoſe ſervices were due; as

the tenant muſt hold of the ſuperior lord. By the conveyance, the eſtate was no longer parcel of the manor, nor held of the manor, neither was the defendant's anceſtor any longer a tenant of the manor; therefore, it was clear that the defendant was not bound to attend the plaintiff's court as a tenant of the manor.

§ 13. The lord of a manor who enfranchiſes copyholds, muſt either be ſeiſed in fee, or have a power to convey the fee-ſimple of the lands to the copyholder, in order to enable him to enfranchiſe them. Ante, ch. 1. f. 36.

§ 14. Although a copyholder ſhould only have a particular eſtate in his copyhold, yet he may take an enfranchiſement which ſhall be deemed abſolute. But in a caſe of this kind, the enfranchiſement ſhall be for the benefit of the perſons in remainder, who would have taken the copyhold intereſt in caſe there had not been an enfranchiſement; and a court of equity will accordingly direct a conveyance from the heirs at law of the particular tenant, to the perſons in remainder, on their paying a proportionate part of the conſideration advanced for the enfranchiſement. Wynne v. Cookes, 1 Bro. Rep. 515. 2d ed.

§ 15. We have ſeen, that whenever lands which have been held by copy of court roll have ceaſed to be demiſed or demiſable by copy, they become incapable of being ever granted again by copy; ſo that, in fact, the copyhold is extinct. When the Lands ceaſe to be demiſable by Copy.

Suſpenſion of Copyholds.

2 Sid. 82.

§ 16. There are ſeveral caſes in which copyholds are ſuſpended only for a certain time, and not abſolutely extinguiſhed. Thus, it is ſaid, that where a perſon who holds a copyhold eſtate becomes king, the copyhold is ſuſpended; for it would be beneath the dignity of a king to perform ſuch ſervices as thoſe to which copyholds are ſubject. But after his deceaſe, the next perſon who becomes entitled to it, (not being a king), ſhall hold by copy, in the uſual manner, and the tenure be revived.

Co. Sup. f. 8. Vide Cro. Eliz. 8.

§ 17. Where a copyholder married the lady of the manor, it was held that this operated as a ſuſpenſion of the copyhold during the marriage only, and was not an extinguiſhment.

1 Rep. 31 *b.*

§ 18. Where a copyholder took a leaſe for years of the manor of which he held, it was reſolved that the copyhold was ſuſpended, becauſe no perſon can be lord and tenant at the ſame time. But that the leſſee might grant it again as copyhold.

TITLE XI.

USE.

CHAP. I.
Of the Origin of Uſes.

CHAP. II.
Of the Nature and Qualities of a Uſe before the Statute 27 Hen. 8.

CHAP. III.
Of the Statute 27 Hen. 8. of Uſes.

CHAP. IV.
Of the modern Doctrine of Uſes.

CHAP. I.

Of the Origin of Uſes.

§ 1. *Origin of Uſes.*
5. *Of the Fidei commiſſum.*
11. *Juriſdiction aſſumed by the Chancellors over Uſes.*
13. *Invention of the Writ of Subpœna.*

Section 1.

THE original ſimplicity of the common law admitted of no immediate eſtate in lands, which was not clothed with the legal ſeiſin and poſſeſſion thereof. But, in proceſs of time, a right to the rents and profits

Origin of Uſes.

profits of lands, whereof another perſon had the legal ſeiſin and poſſeſſion, was introduced; and, though not recognized for a long time by the courts of common law, was, notwithſtanding, ſupported by the Court of Chancery, and became well known by the name of a *Uſe.*

§. 2. The introduction of this novelty has been attended with the moſt ſerious conſequences: and though, at firſt, it appears to have been but a trivial innovation, yet, in its progreſs, it has in fact produced a revolution in the ſyſtem of real property, and introduced a mode of transferring land, very different from that which the old law had originally eſtabliſhed.

§ 3. A uſe was created in the following manner: The owner of lands conveyed them by feoffment, with livery of ſeiſin, to ſome friend; with a ſecret agreement, that the feoffee ſhould be ſeiſed of the lands, to the uſe of the feoffor, or of a third perſon. Thus, the legal ſeiſin was in one; and the uſe, or right to the rents and profits, in another.

§ 4. It would be a matter of conſiderable difficulty, to aſcertain the preciſe time when this diſtinction between the legal ſeiſin, and the right to the rents and profits, was firſt introduced. It is, however, certain, that the practice of conveying lands to one perſon to the uſe of another, did not become general until the reign of *Edw.* 3., when the eccleſiaſtics adopted it, in order to evade the ſtatutes of mortmain, by procuring conveyances of land to be made, not directly to themſelves,

Bac. Read on Uſes, Edit. 1785. p. 22. 1 Rep. 123 4.

ſelves, but to ſome lay perſons; with a ſecret agreement, that they ſhould hold the lands for the uſe of the eccleſiaſtics, and permit them to take the rents and profits.

Of the Fidei commiſſum.

Bac. Read. 19.

§ 5. The idea of a uſe, and the rules by which it was firſt regulated, are now generally admitted to have been borrowed by the eccleſiaſtics, from the *fidei commiſſum* of the civil law. It will, therefore, be neceſſary, to give ſome account of that ſubject.

Vin. ad Inſt. Lib. 2. T. 23. ſ. 1.

By the *Roman* law, a great number of perſons were incapable of being conſtituted heirs, or even of taking a legacy, under the teſtament of a *Roman* citizen; ſuch as exiles, unmarried perſons, thoſe who had no children, *&c.* In order to evade this law, it became uſual for teſtators, to conſtitute ſome perſon their heir who was capable of inheriting; and to annex a requeſt to the deviſe, that the perſon thus conſtituted heir, ſhould give the inheritance to ſome other perſon who was incapable of taking under the will. "*Quibus* "*enim non poterant hæreditatem vel legata relinquere, ſi* "*relinquebant, fidei committibant eorum qui capere ex* "*teſtamento poterant hæreditatem.*"

Juſt. Inſt. Lib. 2. T. 23. ſ. 1.

Id. ſ. 2.

§ 6. This was called *a fidei commiſſum*, of which, *Juſtinian*, in his *Inſtitute*, has preſerved the form: "*Cum igitur aliquis ſcripſerit, Lucius Titius hæres eſto,* "*poteſt adjicere, rogo te Luci Titi, ut cum primum poteris* "*hæreditatem meam adire, eam Caio Seio reddas reſti-* "*tuas.*" The perſon thus conſtituted heir, was called *hæres fiduciarius*; and the perſon to whom the teſta-

tor

tor directed the inheritance to be given, was called *hæres fidei commiſſarius.*

§ 7. In caſes of this kind, the *hæres fidei commiſſarius* had only what the *Roman* lawyers called a *jus precarium*, that is, a right in curteſy, for which the remedy was only by entreaty or requeſt; ſo that the *hæres fiduciarius* was under no legal obligation of complying with the directions of the teſtator. " *Et ideo* " *fideicommiſſa appellata ſunt, quia nullo vinculo juris,* " *ſed tantum pudore eorum qui rogabantur, continebantur.*"

Id. ſ. 1.

§ 8. Thus ſtood the *Roman* law reſpecting the *fidei commiſſum* for ſome centuries; during which time, ſeveral frauds were committed by thoſe, who being conſtituted heirs, with a direction to give the inheritance to ſome other perſon, refuſed to execute the truſt repoſed in them by the teſtator, and converted the property to their own uſe. But *Auguſtus* having been conſtituted heir in the teſtament of *Lucius Lentulus*, with a requeſt to give the inheritance to the daughter of the teſtator, he conſulted all the eminent lawyers at *Rome*, and, in purſuance of their advice, executed the truſt as the teſtator had directed. " *Nam cum (L. Lentulus), de-* " *cederet in Africa, ſcripſit codicillos teſtamento confirma-* " *tos, quibus ab Auguſto petiit per fideicommiſſum ut* " *faceret aliquid; et cum D. Auguſtus voluntatem ejus* " *impleſſet, deinceps reliqui, ejus auctoritatem ſequuti,* " *fidei commiſſa preſtabant: et filia Lentuli legata, quæ* " *jure non debebat, ſolvit.*"

Juſt. Inſt. Lib. 2. T. 25. Proem.

§ 9. It

§ 9. It is natural to ſuppoſe, that this example would have a conſiderable influence over thoſe who afterwards happened to be in the ſame ſituation. *Auguſtus*, however proceeded a ſtep farther, and directed the conſuls to take cognizance of all future caſes of this kind. "*Juſſit conſulibus auctoritatem ſuam interponere.*" And as the practice of creating *fidei commiſſa* increaſed under the emperors, *Claudian* appointed two magiſtrates for the ſole purpoſe of determining caſes of this kind, who were thence called *prætores fidei commiſſarii.* Inſt. Lib. 2. Tit. 23. ſ. 1.

§ 10. *Juſtinian* completed this ſyſtem, and extended the rights of the *hæres fidei commiſſarius*, by a law which enacted, that if a teſtator ſhould direct his heir to give, either the whole, or part of the inheritance, to another, and this circumſtance could not be proved, either by the written will of the teſtator, or the teſtimony of five witneſſes, in caſe the heir ſhould refuſe to comply with the intentions of the teſtator, he was compellable either to take a ſolemn oath that the teſtator had not created any *fidei commiſſum*, or elſe to execute the truſt repoſed in him.

§ 11. Upon the firſt introduction of uſes into the *Engliſh* law, the perſon to whom a uſe was limited, who was called the *ceſtuique uſe*, was exactly in the ſame ſituation with the *hæres fidei commiſſarius*, and depended entirely on the good faith of the feoffees to uſes, or the perſons to whom the lands were conveyed. And it is natural to ſuppoſe, that, while the rights of the *ceſtuique uſe* were ſo extremely precarious, and depended Juriſdiction aſſumed by the Chancellors over Uſes.

depended ſo entirely on the good faith of the feoffee to uſes, many breaches of truſt were committed; nor is it improbable, but that, even the eccleſiaſtics, who firſt introduced this ſpecies of property, became, in ſome inſtances, the dupes of thoſe to whom lands had been conveyed for their uſe. This induced the clerical chancellors of thoſe times to conſider the limitation of a uſe as ſimilar to a *fidei commiſſum*, and binding in conſcience. They, therefore, aſſumed the juriſdiction which *Auguſtus* had given to the *Roman* conſuls, of compelling the execution of uſes in the Court of Chancery.

§ 12. It, however, ſoon appeared, that even this aſſumed juriſdiction was not ſufficient to anſwer their purpoſes; for, whenever a poſitive declaration of a uſe could not be proved, which muſt frequently have happened, when uſes were declared in a ſecret manner, by words only, without writing, the Court of Chancery could not compel the feoffees to uſes to execute them, there being no legal proof that they held the lands to the uſe of any other perſon.

Invention of the Writ of Subpœna.

§ 13. To remedy this inconvenience, *John Waltham* biſhop of *Saliſbury*, and chancellor to king *Richard* 2., took advantage of the privilege given him by the ſtatute of *Weſtminſter* 2. 13 *Edw.* 1. c. 34., of deviſing new writs, and invented the writ of *Subpœna*, returnable only in the Court of Chancery.

2 Comm. 52.

§ 14. The

§ 14. The writ of *ſubpœna* was originally a proceſs in the courts of common law, to enforce the attendance of a witneſs to give evidence; but this new writ of ſubpœna was uſed in the Court of Chancery for the ſame purpoſe as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to anſwer, upon oath, the allegations of the plaintiff; contrary to one of the firſt principles of the common law, that no man can be compelled to criminate himſelf.

§ 15. In the Hiſtory of the *Engliſh* Law, by Mr. *Reeves*, it is ſuggeſted, that the writ of ſubpœna was not originally invented by the biſhop of *Saliſbury*; but only adopted in his court, from a proceſs which had been long before uſed by the council, and againſt which a formal complaint had already been made by the commons, which is to be found in the Rolls of Parliament. Vol. 3. p. 192. Vol. 2. 295.

§ 16. It is well known how averſe the *Engliſh* nation always was from any alteration of their ancient cuſtoms; and that they were particularly jealous of every maxim or rule, taken from the civilians or canoniſts, which was attempted to be introduced, or ſubſtituted in the room of the common law. Accordingly, we find that this innovation did not paſs unnoticed; for early in the next reign, namely, in 2 *Hen.* 4., the commons took notice of the introduction of this writ of ſubpœna, and preſented a ſtrong petition Rot. Parl. Vol. 3. 471.

petition to the king againſt it, praying that it might be aboliſhed; to which *Henry* 4., who was not yet firmly ſettled on the throne, gave a palliating anſwer.

Rot. Parl. Vol. 4. 84.

§ 17. Another petition was preſented to *Henry* 5. by the commons, complaining of the hardſhips to which all perſons were become liable from the introduction of this new writ of ſubpœna; obſerving that it was a novelty againſt the form of the common law, which *John Waltham*, late biſhop of *Saliſbury*, out of his ſubtlety, found out and began, by which perſons were compelled to anſwer upon oath purſuant to the form of the civil law, and the law of the holy church; praying that thoſe, who ſued out ſuch a writ, ſhould inſert all their allegations, and if any perſon was aggrieved by a writ of this kind, in any matter which was determinable at common law, that he ſhould be paid the ſum of forty pounds.

To this petition the king returned for anſwer, *Le roi s'aviſera:* by which means the writ of ſubpœna was firmly eſtabliſhed, and was thenceforth conſtantly uſed, for the purpoſe of compelling all perſons to declare on oath, whether they held particular lands to their own uſe, or to the uſe of any other perſons.

§ 18. From this account of the progreſs of uſes, it evidently appears, that the eccleſiaſtical chancellors adopted

adopted the principles of the civil law in the conſtruction of them; and that the biſhop of *Saliſbury* derived the idea of the ſubpœna, returnable in Chancery, from that law of *Juſtinian* which has been mentioned in a preceding part of this chapter. Ante, ſ. 10.

§ 19. Notwithſtanding the invention of the writ of ſubpœna, it appears that the Court of Chancery did not immediately poſſeſs itſelf of that abſolute juriſdiction over perſons enfeoffed to uſes which it afterwards exerciſed; for, in the rolls of parliament, 9 *Hen.* 5., there is a petition of *William* Lord *Clynton*, ſtating that, upon his going on an expedition to *Ireland*, he had enfeoffed *William de la Pool* of all his lands, for the performance of his will. *Pool* having afterwards refuſed to comply with his intentions, was perſonally called on and examined by parliament; and it was ordered, that he ſhould re-enfeoff Lord *Clynton*; and the feoffment is entered on the rolls of parliament. Vol. 4. 151.

§ 20. The abuſes ariſing from the writ of ſubpœna were, in ſome degree, reſtrained by the ſtatute 15 *Hen.* 6. c. 4. which after reciting, "That divers perſons "had been greatly vexed and grieved by writs of "ſubpœna purchaſed for matters determinable by the "common law of the land, to the great damage of "ſuch perſons ſo vexed, and in ſubverſion and im-"pediment of the common law"—it was enacted, that

that no writ of ſubpœna ſhould be granted, until ſurety was found to ſatisfy the party ſo grieved and vexed for his damages and expences, if the matter could not be made good which was contained in the bill.

TITLE XI.

USE.

CHAP. II.

Of the Nature and Qualities of a Uſe before the Statute 27 Hen. 8.

§ 1. *Nature of a Uſe.*
6. *Eſtate of the Feoffees.*
7. *Neceſſity of Confidence and Privity.*
8. *Confidence in the Perſon.*
11. *Privity of Eſtate.*
14. *Who might be ſeiſed to Uſes.*
19. *What might be conveyed to Uſes.*
20. *Rules by which Uſes were governed.*
21. *Could not be raiſed without a Conſideration.*
22. *Uſes were alienable.*
26. *No Words of Limitation neceſſary.*
27. *Uſes might change by Matter ſubſequent.*
28. *Uſes were revocable.*
32. *Neither Dower nor Curteſy of a Uſe.*
33. *Uſes not extendible.*
34. *Uſes were deviſable.*
36. *Uſes were deſcendible.*
38. *Inconvenience of Uſes.*
40. *Statutes made to remedy them.*

Section 1.

Nature of a Uſe. Read. 5.

LORD *Bacon*, in his juſtly celebrated *Reading on the Statute of Uſes*, obſerves, that it is the nature of all human ſcience and knowledge, to proceed moſt ſafely by negative and excluſive, to what is affirmative and incluſive. And ſpeaking of uſes, he ſays; "An "uſe is no right, title, or intereſt in law:" neither *jus in re*, nor *jus ad rem*: that is, neither an eſtate nor a demand. So that it is nothing for which a remedy is given by the courſe of the common law, being a ſpecies of property totally unknown to it, and for which,

1 Inſt. 272 *b.*

1 Rep. 140 *a.*

it was therefore impoſſible that it ſhould have made
Read. 9. any proviſion. Lord *Bacon* then proceeds to ſtate affirmatively what it is: "An uſe is a truſt repoſed by "any perſon in the terretenant, that he may ſuffer him "take the profits, and that he will perform his intent. "*Uſus eſt dominium fiduciarium.* Uſe is an ownerſhip "in truſt; ſo that *uſus et ſtatus, ſive poſſeſſio, potius* "*differunt ſecundum rationem fori, quam ſecundum na-* "*turam rei.* For that one of them is in court of law, "the other in court of conſcience."

§ 2. The reaſon why the *ceſtuique* uſe had no property whatever by the common law in the lands given to his uſe, was, becauſe where lands were legally conveyed to one perſon, to the uſe of another, the limitation of the uſe was deemed abſolutely void, as it only derived its effect from the declaration of the feoffor; whereas no legal right to a freehold eſtate in lands could be transferred without the ceremony of livery of ſeiſin.

4 Ed. 4. 3. § 3. Thus, in a caſe mentioned in the year books, where *A.* infeoffed *B.* to the uſe of himſelf. The judges obſerve, that, in Chancery, a man ſhall have his remedy according to conſcience, but, in the Common Pleas and the King's Bench, it was otherwiſe; for the feoffee ſhould have the land, and the feoffor ſhould have nothing againſt his own feoffment, though it was only upon confidence.

1 Rep. 140 *a.* Keil. 42. And. 320. § 4. Although the *ceſtuique* uſe was generally in poſſeſſion of the lands, yet he was only conſidered by the courts of common law as tenant at ſufferance: his title

title to the land was of ſo low and precarious a nature, that he could not even juſtify the ſeizing of cattle for treſpaſs: and if he made a leaſe, the leſſee might plead that *ceſtuique* uſe had nothing in the land.

§ 5. When the Court of Chancery firſt aſſumed a juriſdiction in caſes of uſes, it went no farther than to compel payment of the rents and profits to the *ceſtuique* uſe; but, in proceſs of time, it proceeded another ſtep, and eſtabliſhed it as a rule, that the *ceſtuique* uſe had a right to call on the feoffees to uſes, for a conveyance of the eſtate to himſelf, or to any other perſon whom he choſe to appoint; and alſo, to compel them to defend the title to the land. Hence Lord *Bacon* obſerves, that "pernancy of the profits, execution of "eſtates, and defence of the land, were the three "points of a truſt or uſe." Read. 10.

§ 6. As to the legal eſtate in the land, it was veſted in the feoffee to uſes, who performed the feudal duties, and was, in every reſpect, deemed to be the tenant of the fee: it was liable to all his incumbrances; his wife was entitled to dower; if he died leaving an infant heir, the wardſhip belonged to the lord; and if he was attainted of treaſon or felony, the lands were forfeited. Eſtate of the Feoffee.

§ 7. This right in conſcience and equity to the rents and profits of the land, which conſtituted a uſe, was not iſſuing out of the land, but was collateral thereto, and only annexed in privity to a particular eſtate in the land: that is to ſay, the uſe was not ſo attached to the Neceſſity of Confidence and Privity. 1 Rep. 122 *a*. Plowd. 352. Poph. 71, 72.

land that when once created, it muſt ſtill have exiſted, into whoſe hands ſoever the lands paſſed, as in the caſe of a rent, a right of common, or an advowſon appendant; but it was created by a confidence in the original feoffee, and continued to be annexed to the ſame eſtate, as long as that confidence ſubſiſted, and the eſtate of the feoffees remained unaltered. So that, to the execution of a uſe, two things were abſolutely neceſſary; namely, confidence in the perſon, and privity of eſtate.

Confidence in the Perſon.

§ 8. Confidence in the perſon, ſignified that truſt which was repoſed in the feoffees, and aroſe from the notice which was given them of the uſe, and of the perſons who were intended to be benefitted by the feoffment. This confidence was ſometimes expreſſed, and ſometimes only implied. Thus, if a feoffee to uſes enfeoffed another perſon of the land, who had notice of the uſes to which ſuch land was liable, without any conſideration, the new feoffee took it under an implied confidence, and was compellable to execute the uſe. For it was reſolved, that wherever there were feoffees to a uſe, their heirs and feoffees, and all who came into the land under them in the *per*, without conſideration, provided they had notice of the uſe, ſhould be ſeiſed to ſuch uſe, and be compelled in Chancery to execute it.

1 Rep. 122 *a*.

Id.

But if a feoffee to uſes enfeoffed a ſtranger of the land for valuable conſideration, who had no notice of the uſe, as there was no confidence in the perſon, either expreſſed or implied, the uſe was deſtroyed, and

and the new feoffee could not be compelled to execute it.

§ 9. If a ſtranger purchaſed lands from a feoffee to uſes for a valuable conſideration, yet, if he had notice of the former uſes, he would be compelled to execute them. For although the conſideration implied a ſeiſin to his own uſe, yet the notice of the former uſes was a circumſtance which, in a court of equity, would render him liable to execute them. Id.

§ 10. The idea of confidence in the perſon was at firſt extremely limited, for it only extended to the original feoffee. Lord *Bacon* ſays, that in 8 *Edw.* 4., the judges were of opinion, that a ſubpœna did not lie againſt the heir of the feoffee, who was in by law, but that the *ceſtuique* uſe was driven to his bill in parliament. It was, however, ſettled, in the reign of *Hen.* 6., that a ſubpœna would lie againſt all thoſe who came in, in the *per*, without paying a valuable conſideration; and alſo againſt all thoſe who had notice of the former uſes, although they did ~~not~~ pay a valuable conſideration. Read. 23. Year Book, 22 Ed. 4. 18. Keil. 42.

§ 11. With reſpect to privity of eſtate, it is to be obſerved, that a uſe was a thing collateral to the land, and only annexed to a particular eſtate in the land, not to the mere poſſeſſion thereof; ſo that, whenever that particular eſtate in the land, to which the uſe was originally annexed, was deſtroyed, the uſe itſelf was deſtroyed. Thus, where a perſon came into the ſame eſtate whereof the feoffee to uſes was ſeiſed, by con- Privity of Eſtate.

tract or agreement with him, ſuch perſon was liable to the performance of the uſes: but if he came in of any other eſtate than that whereof the feoffee to uſes was ſeiſed, although he had full notice of the uſe, yet the privity of eſtate was thereby deſtroyed, and, conſequently, the lands were no longer liable to the uſes.

1 Rep. 122 *a.*

1 Rep. 139 *b.*

§ 12. It followed from theſe principles, that where a feoffee to uſes was diſſeiſed, the diſſeiſor could not be compelled in Chancery to execute the uſe, becauſe the privity of eſtate was deſtroyed: for the diſſeiſor came in, in the *poſt*, that is, he did not claim by or from the feoffee to uſes, but came in of an eſtate paramount to that of the feoffee to uſes.

1 Rep. 122 *b.*

But if a perſon was diſſeiſed of lands which were liable to a rent, right of common, or any other property of that kind, the lands would ſtill continue ſubject to thoſe charges, notwithſtanding the diſſeiſin; becauſe they were annexed to the poſſeſſion of the land.

1 Rep. 122 *a.*

§ 13. In the ſame manner, where a feoffee to uſes died without heirs, or committed a forfeiture, or married, neither the lord who entered for his eſcheat or forfeiture, nor the huſband who claimed the lands as tenant by the curteſy, nor the wife who was aſſigned her dower, were liable to perform the truſt; becauſe they were not in, in the *per*, that is, in privity of the eſtate to which the uſe was annexed; but claimed an eſtate paramount to that, which was liable to the uſe.

§ 14. With

§ 14. With reſpect to the perſons who were capable of being feoffees to uſes, all private perſons whom the common law enabled to take lands by feoffment, might be ſeiſed to a uſe, and were compellable in Chancery to execute it.

Who might be ſeiſed to Uſes.

Lord *Bacon* ſays, "A feme covert and an infant, "though under years of diſcretion, may be ſeiſed to "an uſe: for, as well as land might deſcend unto "them from a feoffee to uſe, ſo may they originally "be enfeoffed to a uſe."

Read. 58.

§ 15. No corporate body could be ſeiſed to a uſe, becauſe the Court of Chancery could not iſſue any proceſs againſt them for the execution of the uſe; and a corporation cannot be intended to be ſeiſed to any other's uſe.

Plowd. 102.

§ 16. Neither the king nor queen regnant, on account of their royal capacity, could be ſeiſed to any uſe but their own; that is, they might hold the lands, but were not compellable to execute the uſe, as no proceſs could be awarded againſt them by the Court of Chancery.

Year Book, 7 Ed. 4. 17. Bac. R. 56.

§ 17. A queen conſort could not be ſeiſed to a uſe; for, although ſhe was enabled to grant and purchaſe without the king, yet, in regard of the government and intereſt, which the king had in her poſſeſſions, ſhe could not be ſeiſed to a uſe.

Bac. R. 57.

§ 18. When king *Richard* 3. was duke of *Glouceſter*, he had been frequently made feoffee to uſes; and therefore, upon his acceſſion to the throne, he would have been entitled to hold the lands, diſcharged of the uſes. To obviate ſo notorious an injuſtice, an act of parliament was immediately paſſed, which enacted, that where the king had been ſo enfeoffed, jointly with other perſons, the lands ſhould veſt in the other feoffees, as if he had never been named: and that, where the king ſtood ſolely enfeoffed, the eſtate itſelf ſhould veſt in the *ceſtuique* uſe, in like manner as he had the uſe.

1 Rich. 3. c. 5.

What might be conveyed to Uſes.

W. Jones, 127.

§ 19. With reſpect to the ſpecies of property which might be conveyed to uſes, it was held, that nothing whereof the uſe was inſeparable from the poſſeſſion, ſuch as annuities, ways, commons, &c. *quæ ipſo uſu conſumuntur*, could be granted to a uſe; but that all corporeal hereditaments, as alſo incorporeal inheritances, which were *in eſſe*, as rents, advowſons in groſs, local liberties and franchiſes, might be conveyed to uſes.

Rules by which Uſes were governed.

Bac. R. 13.

§ 20. A uſe being a ſpecies of property totally unknown to the common law, and owing its exiſtence to the equitable juriſdiction of the Court of Chancery, the rules by which uſes were governed were derived from the civil law, and differed materially from thoſe by which real property was regulated in the courts of common law. Hence Lord *Bacon* obſerves, that "uſes "ſtood upon their own reaſons, utterly differing from "caſes of poſſeſſion."

§ 21. By

§ 21. By the common law, a feoffment was good without any conſideration. But Lord *Bacon* obſerves, it was eſtabliſhed in Chancery, that a uſe could not be raiſed without a ſufficient conſideration: a rule evidently taken from the maxim of the common law, *ex nudo pacto, non oritur actio.* In conſequence of which, the Court of Chancery would not compel the execution of a uſe, unleſs it had been raiſed for a good or a valuable conſideration; for that would be to enforce *donum gratuitum.*

Could not be raiſed without a conſideration.

Read. 13.

§ 22. Where there was an expreſs declaration of a uſe, it would ariſe without a conſideration. And Lord *Bacon* ſays, that there is no caſe at common law where a perſon can take under a deed, unleſs he is a party to it; whereas a uſe might be declared to a perſon who was not a party to the deed, by which the uſe was raiſed; becauſe a conveyance to a uſe was nothing more than a publication of a truſt.

Read. 14.

§ 23. Although a uſe was but a right, and could only be conſidered as a choſe in action, which, according to the principles of the common law, is neither transferrable nor aſſignable, yet a uſe might be aliened. And Lord *Bacon* obſerves, that there are two inſtances where a right to a uſe was allowed to be tranſferred; for, as no action at law could ariſe from ſuch a transfer, there was no danger of maintenance.

Uſes were Alienable.

Bac. R. 16.

§ 24. It frequently happened, that *ceſtuique* uſe being in poſſeſſion, aliened the lands; and afterwards the feoffees entered, which gave riſe to ſeveral vexatious

ſuits

ſuits in Chancery. To remedy this inconvenience, the ſtatute 1 *Rich.* 3. c. 1., gave the *ceſtuique uſe* in poſſeſſion a power of alienating the legal eſtate, without the conſent or concurrence of the feoffees.

§ 25. A uſe might be transferred by one perſon to another, by any ſpecies of deed or writing; and from its nature, it was impoſſible that it could be the object of a feoffment, with livery of ſeiſin.

No Words of Limitation neceſſary.

Paſch. 27. Hen. 8. 22. 1 Rep. 87 *b.* 100 *b.*

§ 26. In the alienation of uſes, none of thoſe technical words which the law requires in the limitation of particular eſtates, were deemed neceſſary. Thus, a uſe might be limited in fee-ſimple, without the word heirs; for if a ſufficient conſideration was given, the chancellor would decree the abſolute property of the uſe to be well veſted in the purchaſer. And as a uſe was a thing which conſiſted merely in confidence and privity, and was not held by any tenure, the rules of the common law were not violated.

Uſes might change by Matter ſubſequent.

Bro. Ab. Feoff. al Uſe, pl. 30. 13 Rep. 48. Jenk. Cent. 8. 52.

§ 27. A uſe might be limited in ſuch a manner, as to change from one perſon to another, upon the happening of ſome future event. Thus, a uſe might be limited to *A.* and his heirs, until ſome particular event ſhould happen, and then to *B.* and his heirs. For although the rules of the common law do not allow an eſtate in fee-ſimple to be limited after an eſtate in fee-ſimple, yet the Court of Chancery admitted this ſpecies of limitation to be good in the caſe of a uſe; becauſe, as Lord *Bacon* obſerves, "Things may be avoided and determined by the ceremonies and acts like unto

Read. 18.

" unto thoſe by which they are created and raiſed: " that which paſſeth by livery, ought to be avoided by " entry; that which paſſeth by grant, by claim; that " which paſſeth by way of charge, determineth by way " of diſcharge; and ſo a uſe which is raiſed but by " declaration or limitation, may ceaſe by words of " declaration or limitation, as the civil law ſaith; *in* " *his magis conſentaneum eſt, quam ut iiſdem modis res* " *diſſolvantur quibus conſtituantur.*"

Uſes were revocable. 1 Inſt. 237 *a.* 3 Cha. Ca. 66.

§ 28. It was determined upon the ſame principles, that a power of revocation might be annexed to the limitation of a uſe; by which means, the grantor might at any future time revoke the uſes he had declared, and limit new uſes to other perſons, which the feoffee to uſes was bound to execute.

Uſes not an Object of Tenure.

§ 29. A uſe not being conſidered as an eſtate in the land, was not an object of tenure; and was therefore freed from all thoſe oppreſſive burthens which were introduced into *England* by the *Normans*, as conſequences of the feudal ſyſtem. Thus, if a *ceſtuique* uſe was attainted of treaſon or felony, the uſe was not forfeited, either to the king or the lord of the fee, becauſe a uſe was not held of any perſon; and, therefore, in ſome general acts of parliament relating to treaſon, as that of 21 *Rich.* 2. ch. 3. and in moſt particular acts of attainder, that were paſſed after that time, there was a ſpecial proviſion made that the perſons attainted ſhould forfeit all lands whereof they, or any to their uſe, were ſeiſed. And in moſt of thoſe acts

acts proviſion was alſo made, to ſave from forfeiture, ſuch lands whereof the perſons attainted were ſeiſed to the uſe of others.

1 Inſt. 76 *b.*

§ 30. In the ſame manner, if a *ceſtuique* uſe died, leaving a ſon or daughter within age, the lord had not the wardſhip, or marriage of the heir, or a relief on the death of the anceſtor; nor could he claim the lands as an eſcheat, upon the death of the *ceſtuique* uſe without heirs.

§ 31. After the eccleſiaſtics had been reſtrained by the ſtatute 15 *Rich.* 2. c. 5. from acquiring the uſe of lands, it might be ſuppoſed that the practice of conveying lands to uſes would have ceaſed; but it was ſoon found that this was the moſt effectual mode of evading the hardſhips of the feudal tenures, and particularly of ſecuring eſtates from forfeiture for high treaſon. So that, during the conteſts between the Houſes of *York* and *Lancaſter*, as it was the conſtant practice to attaint the vanquiſhed, almoſt all the lands in *England* were conveyed to uſes.

1 Inſt. 272 *a.*

Neither Dower nor Curteſy of a Uſe.

Ante, Tit. 5 and 6.

§ 32. Another circumſtance attending a uſe was, that the huſband or wife of a *ceſtuique* uſe could neither be tenant by the curteſy, nor tenant in dower of the uſe; becauſe the *ceſtuique* uſe had no legal ſeiſin of the land. This was a grievance much complained of; and, therefore, it became cuſtomary, when moſt eſtates in the kingdom were veſted in feoffees to uſes, to ſettle ſome eſtate before marriage on the huſband and wife for

for their lives, which, as we have ſeen, gave riſe to modern jointures. Tit. 7. ch. 1.

§ 33. A uſe was not extendible, becauſe there was no proceſs at common law but againſt legal eſtates; and uſes were only creatures of equity, againſt which there was no common law proceſs; nor could uſes be conſidered as aſſets in the hands of executors, becauſe they deſcended to the heir. Uſes not extendible.

§ 34. Uſes were deviſable, although, at that time, lands were not; and Lord *Bacon* obſerves, that one of the reaſons why ſo much land was conveyed to uſes was, becauſe perſons acquired by that means a power of diſpoſing of their property by will; which enabled them to make a much better proviſion for their family than they could otherwiſe have done. Uſes were deviſable. Read. 20. 1 Rep. 123 *b.*

§ 35. One of the firſt caſes in the Year Books reſpecting uſes was, a woman who had made a feoffment to uſes, afterwards married, and deviſed that her feoffees ſhould convey the legal eſtate to her huſband. It was adjudged, that the will was void at law, being made by a feme covert; and, therefore, ſhould be alſo void in Chancery. Mich. 18 Edw. 4.

§ 36. There was, however, one inſtance in which the chancellors followed the rules of the common law. Uſes deſcended in the ſame manner as legal eſtates, and the doctrine of the half blood was allowed to take place. Even local cuſtoms were left unviolated in this inſtance; for if a *ceſtuique* uſe of lands held in gavelkind Uſes were deſcendible. Bac. R. 11. 1 Inſt. 14 *b.*

kind or borough *Engliſh* died, leaving ſeveral ſons, the uſe deſcended, either to all the ſons, or to the eldeſt, according to the cuſtom.

2 Roll. Ab. 780.

§ 37. So, where a perſon, ſeiſed *ex parte materna*, made a feoffment to uſes, the uſe deſcended to his heirs *ex parte materna*, in the ſame manner as the legal eſtate would have done.

Inconveniencies of Uſes.

§ 38. Thus ſtood the doctrine of uſes as it was regulated and ſettled by the Court of Chancery; and in this ſtate it was, in ſome inſtances, applied to very uſeful purpoſes, by removing the reſtraints on alienation, and enabling the proprietors of real property to exerciſe ſeveral powers over it, which were not allowed by the rules of the common law.

But uſes ſoon became ſo general, and were applied for ſuch bad purpoſes, that, at length, they were productive of very great grievances. Feoffments to uſes were uſually made in a ſecret manner, ſo that, where a perſon had cauſe to ſue for land, he could not find out the legal tenant, againſt whom he was to bring his *præcipe*. Heirs were frequently diſinherited by means of feoffments to the uſe of a perſon's laſt will; widows were deprived of their dower, and huſbands of their tenancy by the curteſy. The king and the feudal lords loſt the profits of their tenures; their fines for alienation, wardſhips, marriages, heriots, and reliefs: and an univerſal obſcurity and confuſion of titles prevailed, by which means, purchaſers for a valuable conſideration were frequently defrauded.

§ 39. To

§ 39. To remedy theſe inconveniencies, ſeveral ſtatutes were made, to ſubject uſes to the ſame rules as legal eſtates. By the ſtatute 50 *Edw.* 3., it was enacted, that where perſons conveyed their tenements to their friends, by colluſion, to have the profits at their will, their creditors ſhould have execution of ſuch tenements as if no ſuch gifts had been made. Two other ſtatutes of the ſame kind were made, 1 *Rich.* 2. c. 9., and 2 *Rich.* 2. ſtat. 2. § 3.

Statutes made to remedy them.

By the ſtatute 1 *Rich.* 3. c. 1., reciting, that by privy and unknown feoffments, great inſecurity, trouble, coſts, and grievous vexations daily grew, it was enacted, that all acts and conveyances made by perſons having only the uſe of lands ſhould be good and effectual, not only againſt the perſons making ſuch acts, but alſo, againſt all perſons having or claiming any eſtate or intereſt in the ſame, to the uſe of thoſe who ſhould make ſuch acts.

By the ſtatute 1 *Hen.* 7. reciting, that when divers of the king's ſubjects having cauſe of action by formedon, *&c.* be defrauded and delayed of their ſaid actions, and oftentimes without remedy, becauſe of feoffments made of the ſame lands and tenements to perſons unknown, *&c.* it was enacted, that the demandant, in every ſuch caſe, ſhould have his action againſt the perſon or perſons of the profits of the lands or tenements demanded, whereof any perſon or perſons had been enfeoffed to his or their uſe.

By

By the ſtatute 4 *Hen.* 7. c. 17., It was enacted, that if any perſon or perſons ſhould be ſeiſed of any eſtate of inheritance, being tenant immediate to the lords of any caſtles, &c. holden by knight ſervice, to the uſe of any other perſon or perſons, and of his heirs only, he to whoſe uſe he or they be ſo ſeiſed dieth, his heir being within age, no will by him declared, nor made in his life touching the premiſes, the lord of whom ſuch caſtles, &c. be holden immediately, ſhould have a writ of right of ward as well for the body as for the land, as the lord ſhould have had if the ſame anceſtor had been in poſſeſſion of the eſtate ſo being in uſe at the time of his death, and no ſuch eſtate to his uſe made; and that, if any ſuch heir be of full age at the death of his anceſtor, to pay relief as his anceſtor whoſe heir he is would have paid if he had been in poſſeſſion of that eſtate, ſo being in uſe at the time of his death, and no ſuch eſtate in his uſe made or had.

By the ſtatute 19 *Hen.* 7. c. 15., it was enacted, that it ſhould be lawful for every ſheriff or other officer to whom any writ or precept ſhould be directed at the ſuit of any perſon or perſons, to have execution of any lands, tenements, or other hereditaments, againſt any perſon or perſons upon any condemnation, ſtatute, merchant, &c. to make and deliver execution unto the party in that behalf ſuing, of all ſuch lands and tenements as any other perſon or perſons be in any manner of wiſe ſeiſed to the only uſe of him, againſt whom execution was ſo ſued.

TITLE

TITLE XI.

USE.

CHAP. III.

Of the Statute 27 Hen. 8. of Uſes.

§ 1. *Hiſtory of the Statute.*
3. *Statute of Uſes.*
5. *Intention of the Statute.*
7. *Circumſtances neceſſary to the Operation of the Statute.*
8. *1ſt, A Perſon ſeiſed to a Uſe.*
9. *What Perſons may be ſeiſed to Uſes.*
13. *Of what Eſtate.*
14. *An Eſtate Tail.*
22. *An Eſtate for Life.*
25. *What Kind of Property may be conveyed to Uſes.*
29. *2dly, A ceſtuique Uſe in Eſſe.*
39. *3dly, A Uſe in Eſſe.*
40. *Saving of all former Eſtates.*

Section 1.

Hiſtory of the Statute.

NOTWITHSTANDING the variety of ſtatutes by which it was endeavoured to make uſes ſubject to the rules of the common law, yet means were found of evading them; particularly in caſes of wardſhips, marriages, and reliefs. For in the ſtatute 4 *Hen.* 7. for enabling lords to have the wardſhip of perſons entitled to a uſe only, an exception was inſerted where the anceſtor had made a will, of which many perſons took advantage, to the great detriment of the king, and the chief lords.

Ante, ch. 2. ſ. 40.

6 Rep. 76 *a.*

§ 2. King *Henry* 8th, in the 23d year of his reign, cauſed a bill to be drawn to moderate, not to remedy altogether this abuſe; he was contented that every

Burnet's Hiſt. of the Ref. 1. p. 116.

man ſhould have the liberty of diſpoſing in this manner of half his land; and he told the parliament in plain terms, if they would not take a reaſonable thing, when it was offered, he would ſearch out the extremity of the law, and then would not offer them ſo much again. The lords came willingly into his terms, but the commons rejected the bill; in conſequence of which the parliament was prorogued (*a*). The king made good his threats; he called together the judges and ableſt lawyers, who argued the queſtion in Chancery, and agreed, that a man could not deviſe any part of his land in prejudice of his heir.

(*a*) Juſtice *Harper* gives the following hiſtory of the ſtatute of uſes: "And as to the making of the ſtatute 27 *Hen.* 8. the truth is, "that the king was diſpleaſed for the loſs of wardſhips, and other "injuries done to him; for which cauſe he complained to the judges "of the defect of the law in that caſe, who thereupon ſhewed unto "the king the cauſes of thoſe injuries and loſſes to the king; and "further ſhewed to the king, that if the poſſeſſion might be joined "to the uſe, all would go well, and all the injuries, wrong, and loſs "which came to the king, by reaſon of ſuch uſes, wills, and ſecret "feoffments, would be avoided. For which the king commanded "his council to frame a bill to that purpoſe, and preſent it to the "houſe of commons in the 24th year of his reign; but it was then "rejected, and the king at that time would have been contented "that the fourth part of the land only ſhould deſcend. And from that "time the king ſtayed further proceedings in the ſaid cauſe, until "27 *Hen.* 8., at which time it took effect: and their care was to "pen the ſtatute ſo preciſely that nothing ſhould be left in the "feoffees, but that the whole eſtate ſhould be executed by the ſta-"tute, ſo as the ſaid ſtatute did utterly take out all from the "feoffees." 2 Leon. Rep. 17, 18.

No account of theſe arguments is to be found in the Year Books; nor do I believe they are mentioned by any legal writer; but it is probable that this determination only related to a deviſe of land, and not to that of a uſe; ſo that all the inconveniencies ariſing from the practice of deviſing uſes, ſtill continued.

Statute of Uſes.

§ 3. The miſchiefs that reſulted from feoffments to uſes increaſed every day; and at length it became abſolutely neceſſary to apply a ſufficient remedy to theſe diſorders. This was effected by the ſtatute 27 *Hen.* 8. ch. 10. intitled, *An act concerning uſes and wills*, and uſually called *the ſtatute of uſes*, reciting that, by the common law, lands were not deviſable by will, nor ought to be transferred but by livery of ſeiſin; yet nevertheleſs divers and ſundry imaginations, ſubtle inventions and practices had been uſed, whereby the hereditaments of the realm had been conveyed by fraudulent feoffments, fines, recoveries, and other aſſurances, and alſo by wills and teſtaments; by reaſon whereof heirs had been unjuſtly diſinherited, the lords had loſt their wards, marriages, reliefs, heriots, eſcheats, aids; married men had loſt their tenancies by the curteſy, and widows their dower; manifeſt perjuries were committed, &c.

§ 4. It is therefore enacted, "That where any per- f. 1.
"ſon or perſons ſtand or be ſeiſed, or at any time
"hereafter ſhall happen to be ſeiſed, of and in any
"honors, manors, lands, tenements, rents, ſervices, re-
"verſions, remainders, or other hereditaments, to the

" uſe, confidence, or truſt of any perſon or perſons, or " of any body politic, by reaſon of any bargain, ſale, " feoffment, fine, recovery, covenant, contract, agree- " ment, will, or otherwiſe, by any manner or means " whatever it be, that in every ſuch caſe, all and every " ſuch perſon and perſons and bodies politic that have, " or hereafter ſhall have, any ſuch uſe, confidence, or " truſt, in fee ſimple or fee tail, term of life or for " years, or otherwiſe, or any uſe, truſt, or confidence " in remainder or reverſion, ſhall from thenceforth " ſtand and be ſeiſed, deemed, and adjudged in lawful " ſeiſin, eſtate, and poſſeſſion, of and in the ſame " honors, caſtles, *&c.* to all intents, conſtructions, " and purpoſes in the law, of and in ſuch like eſtates, " as they had or ſhall have in uſe, truſt, or confidence " of or in the ſame; and that the eſtate, right, title, " intereſt, and poſſeſſion that was in ſuch perſon or " perſons that were or hereafter ſhall be ſeiſed of any " lands, tenements, or hereditaments, to the uſe, con- " fidence, or truſt of any ſuch perſon or perſons, or of " any body politic, to be from henceforth clearly " deemed and adjudged to be in him or them that " have or hereafter ſhall have ſuch uſe, confidence, " or truſt, after ſuch quality, manner, form, and con- " dition as they had before in or to the uſe, confidence, " or truſt that was in them.

ſ. 2. " Where divers and many perſons be or hereafter " ſhall happen to be jointly ſeiſed of and in any lands, " tenements, rents, reverſions, remainders, or other " hereditaments, to the uſe, confidence, or truſt of any " of them, that be ſo jointly ſeiſed, that in every ſuch " caſe,

" caſe, that thoſe perſon or perſons which have or here-
" after ſhall have any ſuch uſe, confidence, or truſt, in
" any ſuch lands, &c. ſhall from thenceforth have and
" be deemed and adjudged to have only to him or
" them that have or hereafter ſhall have any ſuch uſe,
" confidence, or truſt, ſuch eſtate, poſſeſſion, and ſeiſin,
" of and in the ſame lands, tenements, &c. in like
" nature, manner, form, condition, and courſe as he or
" they had before in the uſe, confidence, or truſt of
" the ſame lands, tenements, or hereditaments.

" And where divers perſons ſtand ſeiſed of any lands, f. 4.
" to the uſe and intent that ſome other perſon ſhall re-
" ceive a rent out of the ſame lands, in every ſuch caſe
" the perſon having ſuch uſe and intereſt to have the
" ſame rent, ſhall be adjudged and deemed to be in
" poſſeſſion and ſeiſin of the ſame rent, of and in ſuch
" like eſtate as he had in the uſe of the ſaid rent."

§ 5. It is evident from the words of the ſtatute, that the intention of the legiſlature was, entirely to aboliſh uſes, by deſtroying the eſtate of the feoffees to uſes, and transferring it from them to the *ceſtuique* uſe; by which means, the uſe ſhould be changed into a legal eſtate. And the operation of the ſtatute has ſo far anſwered the intention of the makers of it, that no uſe upon which the ſtatute is allowed to operate, can exiſt in its former ſtate for more than an inſtant, as the legal ſeiſin and poſſeſſion of the land muſt become united to it immediately after its creation.

Intention of the Statute. 1 Rep. 124 a.

§ 6. It therefore followed, that where this ſtatute operated, lands conveyed to uſes could never, in future, become liable to the charges or incumbrances of the feoffees; but, on the other hand, they would be always ſubject to the charges and incumbrances of the *ceſtuique* uſe, and to all the rules of the common law. So that they ceaſed to be deviſeable, and, by that means, the great object of *Hen.* 8, was attained; which was to preſerve his right to wardſhip, and other feudal profits, out of the lands of the nobility.

Circumſtances neceſſary to the Operation of the Statute.

1 Rep. 126 *a.*

§ 7. There are three circumſtances neceſſary to the execution of a uſe by this ſtatute: 1ſt, A perſon ſeiſed to the uſe of ſome other perſon; 2d, A *ceſtuique* uſe *in eſſe;* and, 3d, A uſe *in eſſe*, in poſſeſſion, remainder, or reverſion.

1ſt, A Perſon ſeiſed to a Uſe.

§ 8. With reſpect to the firſt of theſe circumſtances, the words of the ſtatute expreſsly require it, "When "any perſon or perſons ſtand or be ſeiſed, or at any "time hereafter, ſhall happen to be ſeiſed of any "honors, &c. to the uſe, confidence, or truſt, of any "other perſon or perſons." It will, however, be neceſſary, in this place, to inquire, firſt, what perſons are capable of being ſeiſed to uſes; and, ſecondly, of what eſtate or intereſt they can be ſeiſed to uſes.

What Perſons may be ſeiſed to Uſes.

§ 9. All perſons who were capable of being ſeiſed to uſes before the ſtatute may ſtill be ſeiſed to a uſe: and, on the other ſide, all thoſe who were incapable of being ſeiſed to uſes before the ſtatute, ſtill labour under the ſame incapacity.

§ 10. It,

§ 10. It has been ſtated, that neither the king nor queen could, before the ſtatute, have been *ceſtuique* uſe; or rather, were not compellable to execute the uſe. This law continued after the ſtatute; and a ſingular caſe aroſe in 35 *Eliz.* reſpecting the prerogative of the crown to hold lands diſcharged of all uſes. Ante, ch. 1.

§ 11. *A.* committed high treaſon in 18 *Eliz.*, for which he was attainted in 26 *Eliz.* by trial. Between the treaſon and the attainder, a fine was levied to him by *B.* of certain lands to the uſe of *B.* and his wife, (who was ſiſter to *A.*) and of the heirs of the ſaid *B.*; afterwards *B.* and his wife bargained and ſold the lands to *J. S.* for money. Upon diſcovery of the treaſon and the attainder of *A.*, the purchaſer *J. S.* was adviſed by *Plowden* and *Popham*, and many others, that the eſtate of the land was in the queen; becauſe the queen is entitled to all the lands that traitors had, at the time of the treaſon, or after. So the uſe which was declared to *B.* and his wife upon the fine, was void, by the relation of the right of the queen under the attainder: and the queen muſt hold the land, diſcharged of the uſe, becauſe ſhe could not be ſeiſed to a uſe. Pimb's caſe, Mo. 196. 1 Inſt. 13 *a.* n. 7.

It is but juſtice to mention, that the caſe being repreſented to queen *Elizabeth*, ſhe granted the land to the *ceſtuique* uſe, by patent.

§ 12. By the very words of the ſtatute, which are, "any perſon or perſons," aliens and corporations are incapable of being ſeiſed to a uſe. And therefore, it Bac. R. 42. 1 Rep. 122 *a.* King v. Boys Dyer, 283 *b.*

was determined in a caſe reported by *Dyer*, that where an alien and a natural born ſubject were enfeoffed to uſes, the moiety of the alien ſhould, upon office found, become veſted in the crown.

Of what Eſtate a Perſon may be ſeiſed to Uſes.

§ 13. With reſpect to the eſtate or intereſt of which a perſon may be ſeiſed to a uſe, the words of the ſtatute are: "Where any perſon or perſons ſtand or be "ſeiſed, or at any time hereafter ſhall happen to be "ſeiſed." Now, the word ſeiſed extends to every ſpecies of eſtate of freehold; although it appears to have been the general opinion, before, and immediately after the paſſing of this ſtatute, that all feoffees to uſes muſt have been ſeiſed in fee-ſimple.

Eſtate Tail. Cent. 5. Ca. 1.

§ 14. It was formerly much doubted, whether a tenant in tail could be ſeiſed to a uſe; and *Jenkins* ſtates it as a point determined by all the judges, that a tenant in tail cannot be ſeiſed to a uſe either expreſſed or implied. 1ſt, Becauſe the tenure creates a conſideration: 2dly, Becauſe the ſtatute *De Donis* has ſo appropriated and fixed the eſtate tail to the donee and the heirs of his body, that neither he nor they can execute the uſe.

§ 15. The caſe cited by *Jenkins* in ſupport of this doctrine, is that of *Cowper* v. *Franklin*, which aroſe in 12 *Jac.* 1., and is thus reported by *Croke*.—*John Walter* being ſeiſed in fee, made a feoffment to *Thomas Walter*, *habendum* to him and his heirs of his body, to the uſe of him and his heirs and aſſigns for ever. The queſtion was, whether *Thomas Walter* had an eſtate

Cro. Ja. 400.

in

in fee tail only, or in fee, determinable upon the eſtate tail. Firſt, whether a uſe might be limited upon an eſtate tail at the common law, or after the ſtatute of uſes: 2dly, Whether this limitation of uſes to *Thomas Walter* and his heirs ſhould not be intended the ſame uſes, being to the feoffee himſelf, and to the ſame heirs, as it was in the *habendum*. *Croke* reports that the caſe was adjourned; but the opinion of the court upon the argument, inclined that he was tenant in tail, and that the limitation of the uſe out of the eſtate tail was void, as well after the ſtatute as before; for the ſtatute never intended to execute any uſe but that which might be lawfully compelled to be executed before the ſtatute. But this could not be of an eſtate tail, for the Chancery could not compel him, at the common law, to execute the eſtate; and ſo the ſtatute did not execute it then.

§ 16. *Bulſtrode* reports a ſecond argument upon this caſe, together with the judgement of the court; which was, that *Thomas Walter* took an eſtate tail, becauſe a tenant in tail could not be ſeiſed to a uſe. 3 Bulſt. 184.

§ 17. *Godbolt* reports the caſe to have ariſen upon a limitation to one, and to the heirs of his body, *habendum* unto the donee, to the uſe of him, his heirs and aſſigns for ever: and that two points were reſolved, 1ſt, That the limitation in the *habendum* did not increaſe or alter the eſtate given in the premiſes of the deed: 2dly, That tenant in tail might ſtand ſeiſed to a uſe expreſſed; but ſuch uſe could not be averred. 269.

848. § 18. The ſame caſe is alſo reported by *Moor* by the name of *Carrier* v. *Franklin*, who ſeems to have conſidered it as a queſtion of conſtruction, and that the feoffee only took an eſtate tail; becauſe the uſe to him and his heirs, immediately ſucceeding the *habendum*, muſt be conſtrued to mean the ſame kind of heirs, to whom the eſtate had been already limited, that is, the heirs of his body.

§ 19. If this caſe be conſidered as an authority, it will only prove that a tenant in tail cannot be ſeiſed to a uſe in fee. But that a tenant in tail may be ſeiſed to a uſe coextenſive with his eſtate, is a doctrine which it would be Read. 57. extremely dangerous to controvert. And Lord *Bacon* expreſsly ſays, that a tenant in tail may be ſeiſed to a uſe:— "If I give land in tail by deed ſince the ſta- "tute to *A.*, to the uſe of *B.* and his heirs, *B.* hath a "fee-ſimple determinable upon the death of *A.* with- "out iſſue; and like law, though doubtful before the "ſtatute was: for the chief reaſon that bred the doubt "before the ſtatute, was, becauſe tenant in tail could "not execute an eſtate without wrong; but that ſince, "the ſtatute is quite taken away, becauſe the ſtatute "ſaveth no right of entail, as the ſtatute of 1 *Rich.* 3. "did,"

10 Rep. 95. § 20. In *Seymour*'s caſe, 10 *Jac.* 1., a tenant in tail bargained and ſold his eſtate tail to a ſtranger in fee; and it was unanimouſly reſolved by the Court of King's Bench, that the bargainee took an eſtate to him and his heirs, determinable upon the death of the tenant in

in tail. Now this determination muſt have been founded upon the principle, that a tenant in tail may be ſeiſed to a uſe; for, otherwiſe, the bargain and ſale would have been void. Tit. 32.

§ 21. It may, therefore, be now laid down as an undoubted principle of law, that a tenant in tail may be ſeiſed to a uſe, even in fee; and that ſuch uſe will be good againſt the tenant in tail. And as tenants in tail have, ever ſince the time of Lord *Coke*, been in the practice of transferring their eſtates to the perſons who were to be tenants to the *præcipe*, and to their heirs, by conveyances derived from the ſtatute of uſes. If it were eſtabliſhed that a tenant in tail cannot be ſeiſed to a uſe, the conſequence would be, that almoſt all the common recoveries which have been ſuffered for the laſt century, would be void, for want of a good tenant to the *præcipe*. 2 Rep. 77 *a*.

§ 22. A tenant for life may be ſeiſed to a uſe; but ſuch uſe will determine, together with the legal eſtate transferred to it by the ſtatute, upon the death of the tenant for life. Eſtate for Life.

§ 23. In 2 & 3 *Eliz.*, this caſe was moved. Lands were given to two perſons for their lives, and the life of the ſurvivor, to the uſe of *A. B.* for his life. The two donees to uſes died; and the queſtion was, whether the eſtate to *A. B.* was determined. The court thought that the eſtate was determined, becauſe the eſtate on which the uſe was created and raiſed was gone. Dyer, 186 *a*. Crawley's caſe, Cro. Eliz. 721,

§ 24. It

§ 24. It follows from this caſe which is cited and admitted to be good law in *Bulſtrode's* report of *Cowper* v. *Franklin*, that all perſons having a legal eſtate of freehold may be ſeiſed to a uſe. If the uſe is greater than the eſtate out of which it is created, it will ceaſe upon the determination of that eſtate; but will be good in the mean time.

Cro. Car. 231.

What Kind of Property may be conveyed to Uſes.

§ 25. With reſpect to the different kinds of property whereof a perſon may be ſeiſed to the uſe of another, the words of the ſtatute are—"Honors, caſtles, manors, lands, tenements, rents, ſervices, reverſions, remainders, or other hereditaments;" which comprehend every ſpecies of real property in poſſeſſion, remainder, or reverſion; and, therefore, not only corporeal hereditaments, but alſo, incorporeal ones, ſuch as advowſons, tythes, rents, *&c.* are within this ſtatute.

Cro. Eliz. 401. 2 Roll. Ab. 790.

§ 26. Nothing, however, can be conveyed to uſes, but that whereof a perſon is ſeiſed at the time; for, in law, every diſpoſal ſuppoſes a precedent property; and therefore, no man can convey a uſe in land, of which he is not in poſſeſſion, when the conveyance is made.

Read. 43.

§ 27. Lord *Bacon* ſays, that the word hereditament in the ſtatute, is to be underſtood of thoſe things whereof an inheritance is *in eſſe*; and yet a grant of a rent charge *de novo* for life, to a uſe, is good enough; although there is no inheritance in being of this rent. It ſhould, however, be obſerved, that, in this caſe, there

there is a ſeiſin of the land, out of which the rent is granted.

§ 28. Copyhold eſtates are, however, not comprehended within the ſtatute of uſes; becauſe a tranſmutation of poſſeſſion, by the ſole operation of the ſtatute, without the concurrence or permiſſion of the lord, would be an infringement of the lord's rights, and would tend to his prejudice. Co. Cop. ſ. 54. Tit. 11. ch. 3. Gilb. Ten. 182. Cowp. R. 709.

§ 29. The ſecond circumſtance neceſſary to the execution of a uſe by this ſtatute is, that there muſt be a *ceſtuique* uſe *in eſſe*. If, therefore, a uſe be limited to a perſon not *in eſſe*, or to a perſon uncertain, the ſtatute can have no operation. 2dly. A Ceſtuique Uſe in Eſſe. Bac. R. 60. Id. 42.

§ 30. With reſpect to thoſe who may be *ceſtuique* uſe, all perſons capable of taking lands by any common law conveyance, may be *ceſtuique* uſe. And, by the words of the ſtatute, a *ceſtuique* uſe may be entitled to an eſtate "in fee-ſimple or fee-tail, term of life, "or for years, or otherwiſe; or in remainder or re-"verſion."

§ 31. Lord *Bacon* ſays, the king may be a *ceſtuique* uſe, but it behoveth both the declaration of the uſe, and the conveyance itſelf, to be matter of record, becauſe the king's title is compounded of both. A corporation may alſo be a *ceſtuique* uſe. Read. 60.

§ 32. The *ceſtuique* uſe muſt, in general, be a different perſon from him who is ſeiſed to the uſe: for Lord

Read. 63. Lord *Bacon* ſays, " the whole ſcope of the ſtatute was " to remit the common law, and never to intermeddle " where the common law executed an eſtate; there- " fore the common law ought to be expounded, that " where the party ſeiſed to the uſe, and the *ceſtuique* " uſe is one perſon, he never taketh by the ſtatute, " except there be a direct impoſſibility or impertinency " for the uſe to take effect by the common law."

Jenkins v. Young, Cro. Car. 230. § 33. Thus, where lands were given to a man and his wife, *habendum* to the ſaid huſband and wife, to the uſe of them and the heirs of their two bodies; and for default of ſuch iſſue, to the uſe of *A. B.* The queſtion was, whether the huſband and wife had an eſtate tail, or only an eſtate for their lives. And it was adjudged that they took an eſtate tail.

Upon a writ of error in the King's Bench, it was argued, that the eſtate out of which the uſe aroſe was but for their lives, and, conſequently, the uſe could not be limited for a larger eſtate. But *Croke*, *Jones*, and *Whitlock*, were of opinion that there was a difference, where an eſtate was limited to one, and the uſe to another; there the uſe could not be more than the eſtate out of which it was derived: but it was otherwiſe where the limitation was to two perſons, *habendum* to them, to the uſe of them and the heirs of their bodies: this was no limitation of the uſe; nor was the uſe to be executed by the ſtatute; but they took by the common law.

§ 34. The

§ 34. The ſame point aroſe in the ſubſequent term, in a writ of error from a judgement given in *Wales*, the court held, that the limitation in the *habendum* was a limitation of the land itſelf, and not of the uſe. Meredith v. Jones, Cro.Car.244.

§ 35. In a modern caſe, Lord Chief Juſtice *Holt* is reported to have ſaid; "If a fine be levied to a man "and his heirs, to the uſe of him and his heirs, in "this caſe, he ſhall take by the common law, and not "by way of uſe." And the late Mr. *Booth*, in an elaborate opinion on this ſubject, ſays, "If at this day "a man ſhould enfeoff *J. S.* to hold to the ſaid *J. S.* "and his heirs, to the uſe and behoof of the ſaid *J. S.* "and his heirs for ever, no man living would call that "a ſtatute uſe; for the words would import no more "than the words, for his and their ſole benefit and "behoof, and would only ſerve to ſhow, in how ample "and beneficial a manner the feoffee was to take the "eſtate limited to him by the *habendum*, which being "manifeſtly an eſtate at common law, could not alſo "give or create a ſtatute uſe." Gilb. Rep. 17. Caſes and Opinions, vol. 2. 294.

§ 36. There are, however, ſome caſes, where the ſame perſon may be ſeiſed to a uſe, and alſo *ceſtuique* uſe.

Thus, if a man makes a feoffment in fee to one, to the uſe of him and the heirs of his body, in this caſe for the benefit of the iſſue, the ſtatute, according to the limitation of the uſes, diveſts the eſtate veſted in him by the common law, and executes the ſame in himſelf by force of the ſtatute: and yet the ſame is out 13 Rep. 56. Bac. R. 63.

of

of the words of the ſtatute, which are, "to the uſe of "any *other* perſon;" and here he is ſeiſed to the uſe of himſelf. But the ſtatute hath been always beneficially expounded to ſatisfy the intention of the parties, which is the direction of the uſe according to the rule of the law.

13 Rep. 56. § 37. So, if a man ſeiſed of lands in fee-ſimple, covenants with another, that he and his heirs will ſtand ſeiſed of the ſame land, to the uſe of himſelf and the heirs of his body, or to the uſe of himſelf for life, the remainder over in fee; in that caſe, by the operation of the ſtatute, the eſtate which he hath at the common law is diveſted, and a new eſtate veſted in himſelf, according to the limitation of the uſe.

Read. 64. § 38. Lord *Bacon* ſays, if a perſon enfeoffs *J. S.* to the uſe of *J. D.* for life, remainder to the uſe of *J. S.* for life, remainder to the uſe of *J. N.* in fee, *J. S.* is in by the ſtatute; becauſe the law will not admit fractions of eſtates.

Id. So, if a perſon enfeoffs *J. S.* to the uſe of himſelf and a ſtranger, they ſhall be both in by the ſtatute; becauſe they could not take jointly, taking by ſeveral

Id. titles. Like law, if I enfeoff a biſhop and his heirs, to the uſe of himſelf and his ſucceſſors, he is in by the ſtatute, in right of his ſee.

3dly, A Uſe in Eſſe. 1 Rep. 126 *a.* § 39. The third circumſtance neceſſary to the execution of a uſe by this ſtatute is, that there ſhould be a uſe *in eſſe*, in poſſeſſion, remainder, or reverſion. When

When all theſe circumſtances concur, the poſſeſſion and legal eſtate in the lands, out of which the uſe was granted, is immediately taken from the feoffee to uſes and veſted in the *ceſtuique* uſe; and the poſſeſſion thus transferred is not a mere ſeiſin or poſſeſſion in law, but an actual ſeiſin and poſſeſſion in fact; not a mere title to enter upon the land, but an actual eſtate.

Bac. R. 46. Anon. Cro. Eliz. 46.

§ 40. The third ſection of the ſtatute contains a ſaving "to all and ſingular thoſe perſons, and to their "heirs, which be or hereafter ſhall be ſeiſed to any uſe, "all ſuch former right, title, entry, intereſt, poſſeſſion, "rents, cuſtoms, ſervices, and action, as they or any "of them might have had to his or their own proper "uſe, in or to any manors, lands, tenements, rents, or "hereditaments, whereof they be or hereafter ſhall be "ſeiſed to any other uſe, as if this act had not been "made."

Saving of all former Eſtates.

§ 41. In conſequence of this clauſe, no term for years or other intereſt, whereof a perſon to whom lands are conveyed to uſes, is poſſeſſed in his own right, will be merged by ſuch conveyance.

7 Rep. 19 *b.* 20 *a.*

§ 42. *A.* demiſed lands to *B.* for a term of years, and afterwards the leſſor by bargain and ſale inrolled, and fine, conveyed the ſame lands to the leſſee and others and their heirs, to the uſe of them and their heirs, to the intent that a common recovery ſhould be had and ſuffered againſt them, with voucher of the leſſor, to the uſe of a ſtranger; all which was done accordingly.

Ferrers and Curſon v. Fermor, Cro. Ja. 643.

The queſtion was, whether the term for years was merged: and it was determined, that the term ſtill exiſted; for although it was merged by the union of the eſtates, until the recovery was ſuffered, yet, when that was done, the uſes thereof being guided by the bargain and ſale, it was the ſame as if there had been no conveyance; it being within the equity and intention of the ſaving in the third ſection of the ſtatute of uſes. For the intention of that ſtatute was, not to deſtroy prior eſtates, but to preſerve them. And it was agreed by the whole court, that if a fine or feoffment had been levied or made to the leſſee for years, his term would not have been thereby extinguiſhed.

It was objected that the bargain and ſale and fine were to the uſe of the leſſee for years, otherwiſe he could not have been tenant of the freehold; and, therefore, the ſaving in the ſtatute of uſes did not extend to this caſe. But it was anſwered and reſolved, for the former reaſons, that the term was ſaved by the equity of the ſtatute.

Cook v. Fountain, 1 Vent. 195. 280. S. P.

TITLE XI.

USE.

CHAP. IV.

Of the modern Doctrine of Uſes.

§ 1. *Conſtruction of the Statute.*
3. *Contingent Uſes.*
4. *Uſes ariſing on the Execution of Powers.*
8. *Conveyances derived from the Statute of Uſes.*
15. *Whether a Deviſe operates by the Statute of Uſes.*
16. *Reſulting Uſes.*
28. *Uſes by Implication.*
33. *No Uſe will reſult inconſiſtent with an Eſtate limited.*
38. *No Uſe will reſult againſt the Intent of the Parties.*
43. *No Uſe reſults but to the Owner.*
45. *What Uſe reſults to a Tenant in Tail.*
52. *No Uſe reſults on a Grant of an Eſtate in Tail, for Life, or Years.*
56. *No Uſe reſults on a Deviſe.*

Section 1.

Conſtruction of the Statute.

1 Rep. 129 *b.*

WHEN the ſtatute of uſes firſt became a ſubject of diſcuſſion in the courts of law, it was held by the judges, that no uſes ſhould be executed by the ſtatute, which were limited againſt the rules of the common law: for it appeared by the preamble of the ſtatute, that it was the intent of the makers of the act to reſtore the ancient law, and to extirpate and extinguiſh ſuch ſubtle practiſed feoffments, fines, recoveries, abuſes, and errors, tending to the ſubverſion of the good and ancient common law of the land. So that it fully appeared that this act ſhould not execute any uſe which was limited againſt the rules of the common law; for

the intent of the act was to extinguiſh and extirpate, not the feoffment, fine, or recovery, for theſe were laudable and good conveyances of lands and tenements by the common law, as is in effect recited in the beginning of the preamble; but thoſe uſes which were abuſes and errors, and therefore erroneous, becauſe they were againſt the rules of the common law. And the ſtatute 27 *Hen.* 8., was a law of reſtitution; namely, to reſtore the good ancient common law, which was in a manner ſubverted by abuſive and erroneous uſes; and not to give more privilege to the execution of uſes, than to eſtates which were executed by the ancient common law.

1 Rep. 130 *a.*

§ 2. The courts have ſo far adhered to this conſtruction of the ſtatute of uſes, that the ſame technical words of limitation are now required in the creation of eſtates, through the medium of uſes, as in the creation of eſtates at common law. But in many other inſtances, this doctrine was departed from, and advantage was taken of an expreſſion in the ſtatute of uſes, in order to ſupport ſeveral of thoſe limitations which had been allowed by the Court of Chancery, in declarations of uſes, when they were diſtinct from the legal eſtate.

1 Rep. 87 *b.*

Contingent Uſes.

§ 3. The ſtatute of uſes enacts, that the eſtate of the feoffee to uſes ſhall be in the *ceſtuique* uſe, "after "ſuch quality, manner, form, and condition as they "had before, in or to the uſe, confidence, or truſt that "was in them." Now, the Court of Chancery having permitted a limitation of a uſe for life, or in tail, to ariſe *in futuro*, without any preceding eſtate to ſupport it,

and

and alſo a uſe to change from one perſon to another, by matter *ex poſt facto*, though the firſt uſe were limited in fee. The courts of law, in proceſs of time, admitted of limitations of this kind, in conveyances to uſes; and determined that, in ſuch caſes, the ſtatute would transfer the poſſeſſion to the *ceſtuique* uſe, after ſuch quality, form, and condition, as he had the uſe.

An account of the nature of theſe limitations will be given under Title 16. Remainders.

Uſes ariſing on the Execution of Powers.

§ 4. By the rules of the common law, no reſtriction or qualification could be annexed to a conveyance of lands except a condition.

1 Inſt. 237 *a*.

In conſequence of this principle, a fine or feoffment, with a power of revocation annexed to it, was void at common law; becauſe the fine or feoffment transferred the whole property and right of diſpoſal, to the cognizee or feoffee, and therefore, the power of revocation was repugnant to the force of the preceding words. Beſides, the admiſſion of ſuch a clauſe, would have introduced a double power, veſted in different perſons, over the ſame thing; which was contrary to the principles of the common law.

Ante,

§ 5. We have, however, ſeen, that before the ſtatute of uſes, if a feoffment was made to uſes, the feoffor might reſerve a power either to himſelf, or to ſome other perſon, to revoke the uſes declared on the feoffment, and to appoint the feoffees to ſtand ſeiſed to other uſes. For the

principle, on which uſes were originally founded, being, that the feoffee to uſes was bound in conſcience, to purſue the directions of the feoffor, this obligation was equally binding, whether the agreement was that the feoffor ſhould receive the rents and profits himſelf, or ſome ſtranger; or whether they were to be paid in ſuch manner as the feoffor, or any other perſon to whom he delegated his power, ſhould at any future time appoint.

§ 6. The ſtatute of uſes veſts the legal eſtate in the *ceſtuique* uſe, after ſuch quality, manner, and form, as he had in the uſe: from which the courts concluded, that in all conveyances to uſes, a power might be reſerved of revoking a former limitation of a uſe, and appointing a new uſe to ſome other perſon. Mr. *Booth* has, therefore, very properly, claſſed eſtates ariſing from the execution of powers, under the head of contingent uſes. And as powers of this kind were ſoon found to be much more convenient than conditions, they were generally introduced into all family ſettlements.

1 Inſt. 237 *a.*

Opinion at the End of Shep. Touch.

§ 7. Thus, if a perſon conveys his eſtate to truſtees to the uſe of himſelf for life, remainder to his firſt and other ſons in tail, and inſerts a proviſo, that it ſhall be lawful for him at any future time to revoke theſe uſes, and to declare new ones, and that, immediately upon ſuch revocation and new declaration, the truſtees ſhall ſtand ſeiſed of the lands to the uſe of ſuch perſons as the ſettlor ſhall appoint, this is a power of revocation and appointment; and as ſoon as it is executed, the uſes originally limited ceaſe, and a new uſe immediately

diately ariſes out of the ſeiſin of the feoffees to the perſon named in the appointment, for ſuch eſtate as is given him by the appointment; and the ſtatute tranſfers the legal eſtate to ſuch appointee, who by that means acquires the actual ſeiſin and poſſeſſion.

The nature of revocations and appointments of uſes will be explained in Title 32. Deed.

§ 8. It has been frequently obſerved, that the principal object of the ſtatute 27 *Hen.* 8., was to deſtroy all thoſe ſecret conveyances to uſes which had been ſo much complained of; but that, inſtead of having that effect, this ſtatute has given riſe to ſeveral new modes of transferring lands, unknown to the ſimplicity of the common law, and of a more ſecret nature than feoffments to uſes; ſo that, notwithſtanding the great caution with which this ſtatute was made, it has not anſwered the intention of the legiſlature. Conveyances derived from the Statute of Uſes. 1 Atk. 591.

§ 9. This obſervation ſeems to have been founded on an idea, that the chief object of the ſtatute was to deſtroy all conveyances to uſes. But Lord *Bacon* has clearly proved, that the intention of this ſtatute was only to deſtroy the eſtate of the feoffee to uſes, by transferring it to the perſons who were entitled to the uſe, and not to deſtroy the form of the conveyance to uſes. 1ſt, Becauſe the words of the ſtatute are, "where "any perſon is ſeiſed or *hereafter* ſhall be ſeiſed to any "uſe." 2dly, In the ſame ſeſſion in which this ſtatute was made, it was enacted, that all bargains and ſales to uſes, ſhould be inrolled; which proves that Read. 39.

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§ 10. But whatever might have been the intention of the legiſlature in paſſing this ſtatute, it is certain that it has given riſe to ſeveral new ſorts of conveyances, which operate contrary to the rules of the common law. For it being ſoon obſerved that there was nothing in the ſtatute to prevent the raiſing of uſes, but only a proviſion that when a uſe was raiſed, the poſſeſſion of the land ſhould be transferred to ſuch uſe; it was only neceſſary to raiſe a uſe, and the legal ſeiſin and eſtate became immediately veſted in the *ceſtuique* uſe, by a kind of parliamentary magic, without livery of ſeiſin, entry, or attornment.

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§ 13. In both theſe caſes a uſe ariſes out of the ſeiſin of the feoffee, cognizee, or recoveror, to the perſon to whom ſuch uſe is declared, and the ſtatute immediately trensfers to that uſe, the actual poſſeſſion and legal eſtate.

§ 14. Theſe latter aſſurances are ſaid to operate by means of a tranſmutation of poſſeſſion; becauſe the legal ſeiſin and eſtate is firſt transferred by ſome common

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mon law, conveyance, or aſſurance. They are uſually called *declarations of uſes*, and will be treated of under Title 32. Deed.

Whether a Deviſe operates by the Statute of Uſes.

Collect. Jur. Vol. 1. 427.

1 Inſt. 271 *b.* n. 1. ſ. 3. 5.

1 Roll. Ab. 412. p. 25. Dyer, 127.

Fearne's Op. 432.

§ 15. It is a matter of doubt whether a deviſe, under the ſtatute 32 *Hen.* 8., can operate by means of the ſtatute of uſes. The late Mr. *Booth* was of opinion that it did not. The queſtion is fully and ably diſcuſſed by Mr. *Butler*, in his notes to the 15th edition of the firſt *Inſtitute*; who concludes his obſervations on that ſubject with the following words: "But whether a deviſe to uſes operates ſolely by the "ſtatute of wills, or by that ſtatute jointly with the "ſtatute of uſes, is, except in a very few caſes, a matter "rather of ſpeculation than of uſe; as it is now ſettled, "that an immediate deviſe to uſes, without a ſeiſin to "ſerve thoſe uſes, is good; and that where the eſtate "is deviſed to one, for the benefit of another, the "courts execute the uſe in the firſt or ſecond deviſee, "as appears to ſuit beſt with the intention of the "teſtator."[1]

Reſulting Uſes.

Dyer, 186 *b.* 11 Mod. 182. And. 37. p. 95.

§ 16. Before the ſtatute 27 *Hen.* 8., if a perſon had conveyed his lands to another, without any conſideration or declaration of the uſes of ſuch conveyance, he became entitled to the uſe or pernancy of the profits of the land thus conveyed. This doctrine was not altered by the ſtatute of uſes, and, therefore, it became an eſtabliſhed principle, that where the legal ſeiſin and eſtate in lands is transferred by any common law conveyance or aſſurance, and no uſe is expreſsly declared, nor any conſideration or evidence of intent to direct the

the uſe, ſuch uſe ſhall reſult back to the original owner of the eſtate. For where there is neither conſideration nor declaration of uſes, or any circumſtance to ſhew the intention of the parties, it cannot be ſuppoſed that the eſtate was intended to be given away.

§ 17. In conſequence of this principle, Lord *Coke* has laid it down as a rule, "That ſo much of the uſe "as the owner of the land does not diſpoſe of, re- "mains in him." So that, where a perſon ſeiſed in fee, levies a fine, or ſuffers a recovery, without any conſideration or declaration of the uſes to which it ſhall enure, the uſe reſults back to himſelf, and the ſtatute immediately transfers the legal eſtate to ſuch reſulting uſe; by which means, he is ſeiſed in the ſame manner as he was before. And if any particular uſes are declared, ſo much of the old uſe as is not declared to be veſted in ſome other perſon, reſults back to the original owner.

1 Inſt. 23 *a*. 271 *a*. Dyer, 166 *a*.

Armſtrong v. Wolſeley, 2 Wilſ. R. 19.

§ 18. Where a perſon made a feoffment to the uſe of ſuch perſon or perſons, and for ſuch eſtate and eſtates as he ſhould appoint by his will, it was reſolved, that the uſe reſulted to the feoffor, until he made an appointment.

Sir E. Clere's caſe, 6 Rep. 17 *b*.

§ 19. Where a perſon made a feoffment to the uſe of himſelf, and his intended wife, after their marriage, it was determined, that the uſe reſulted to the feoffor and his heirs until the marriage.

Woodliff v. Drury, Cro. Eliz. 439.

§ 20. When

Beckwith's caſe, 2 Rep. 58 *b.* Dyer, 146*b.*

§ 20. When huſband and wife levy a fine of the wife's eſtate, without any declaration of uſe, that is ſufficient in law, the uſe will reſult back to the wife only, becauſe the eſtate in the land paſſed only from her; and the huſband joined with her only for conformity.

§ 21. Where a perſon levies a fine of his eſtate to truſtees to certain uſes, and does not declare any uſe of the eſtate during his own life, it will reſult to himſelf.

Penhay v. Hurrell, 2 Vern. 270. 2 Freem. 258.

§ 22. A fine was levied to the uſe of truſtees for 700 years, remainder to other truſtees for 300 years, and from and after the death of the cognizor, to the uſe of his ſon for his life, with remainder to the firſt and other ſons of ſuch ſon in tail; it was reſolved by the Lord Keeper, after conſideration had with all the judges, and a caſe, that as the cognizor had not limited away the freehold to any perſon during his own life, it reſulted back to himſelf.

Vide Tippin v. Coſin, 4 Mod. 380.

Wills v. Palmer, 2 Black. Rep. 687.

§ 23. *Archdale Palmer*, in conſideration of the marriage of his ſon, ſettled an eſtate to the uſe of his ſon for life, remainder to his intended wife for life, remainder to the firſt and other ſons of the marriage in tail, remainder to the heirs male of the body of *Archdale Palmer*, remainder over; it was reſolved, that as the limitations to the ſon, and his firſt and other ſons, might determine during the life of *Archdale Palmer*, a uſe reſulted to him for life, expectant upon

upon the determination of the eſtates limited to his ſon, &c.

§ 24. Where a fine was levied by a tenant for life, the remainder man in tail, and the reverſioner in fee, and a declaration of the uſes was executed by the tenant for life, and the remainder man in tail only, it was determined that the uſe of the reverſion in fee reſulted to the reverſioner. Roe v. Popham. Doug. Rep. 24.

§ 25. In the caſe of a leaſe and releaſe without any declaration of uſes, no uſe reſults to the releaſor, for reaſons which will be ſtated when that mode of conveyance is explained. But if any particular uſe is declared upon a leaſe and releaſe, the reſidue of the uſe will reſult back to the releaſor. Tit. 28. ch.

§ 26. Where the ſame uſe is limited to the owner of the eſtate which would have reſulted to him, in caſe no declaration of that uſe had been made, the declaration is void, and he takes it as a reſulting uſe.

§ 27. *Anthony Mitford* being ſeiſed in fee of the eſtate in queſtion, conveyed the ſame to the uſe of his eldeſt ſon and his wife, and the heirs male of the body of his ſon, remainder to the uſe of his own right heirs; it was unanimouſly reſolved, that the uſe limited to the right heirs of *Mitford* was the antient uſe, which was never out of him, and was, in fact, a reverſion in him to grant or charge, and ſhould deſcend from him to his heir as if it had not been mentioned: and that the limitation Read and Morpeth v. Errington, Cro. Eliz. 321. Mo. 284.

limitation to his right heirs was void, being no more than what the law had already veſted in him.

Uſes by Implication.

§ 28. The ſame rule takes place in all conveyances to uſes, which operate without tranſmutation of poſſeſſion; as in covenants to ſtand ſeiſed, and bargains and ſales, where the uſes ariſe out of the eſtate of the covenantor or bargainor: for, in theſe caſes, ſo much of the uſe as the covenantor or bargainor does not diſpoſe of, ſtill remains in him as his old eſtate, and is uſually called, *an uſe by implication.*

Moore v. Magrath, Cowp. Rep. 9.

Pybus v. Mitford, 1 Vent. 327.

§ 29. *A.* being ſeiſed in fee, covenanted to ſtand ſeiſed to the uſe of his heirs-male begotten, or to be begotten on the body of his ſecond wife; it was determined, that *A.* took an eſtate for life by implication. For the limitation being to the heirs of his body, *&c.* and it being impoſſible for him to have any ſuch heirs during his life, as *nemo eſt hæres viventis*, the uſe was undiſpoſed of during his life, and remained in him.

§ 30. But where the uſe is expreſsly limited away during the life of the grantor, no uſe can reſult to him.

Tippin v. Coſin, 4 Mod. 380. 1 Ld. Ray. 33.

§ 31. A perſon, in conſideration of marriage, conveyed lands to truſtees, to the uſe of himſelf and his heirs until the marriage, and then to the uſe of his intended wife for life for her jointure, remainder to truſtees and their heirs during the life of the huſband, in truſt to ſupport contingent remainders, but to permit the

the huſband to receive the rents and profits during his life, remainder to the firſt and other ſons of the marriage in tail male, remainder to the heirs-male of the huſband by his then intended wife, remainder over.

It was reſolved that no uſe reſulted to the huſband, becauſe there was a diſpoſition of the entire eſtate.

§ 32. It follows from the ſame principle, that where a uſe does not ariſe upon a covenant to ſtand ſeiſed, or bargain and ſale, either for want of a ſufficient conſideration, or for any other cauſe, ſuch uſe remains in the covenantor.

§ 33. Where a uſe is expreſsly limited to the original owner of the eſtate, he will not be allowed to take any reſulting or implied uſe, inconſiſtent with the uſe limited to him.

No Uſe will reſult inconſiſtent with an Eſtate limited.

Fearne Cont. Rem. 50.

§ 34. Thus, if a perſon makes a feoffment in fee, to the uſe of himſelf for life, the fee-ſimple will remain in the feoffees; for, otherwiſe, the feoffor would not have an eſtate for life according to the limitation, as it would merge in the fee. But if the uſe was declared to the feoffor in tail, it would be otherwiſe, for both the eſtates might be in him at the ſame time.

Dyer, 111 & n. 46.

§ 35. So, if *A.* makes a feoffment to the uſe of himſelf for 40 years, and does not limit any other eſtate, the fee-ſimple will remain in the feoffees; for otherwiſe the term would be merged.

Id.

§ 36. One

Adams v. Savage, 2 Salk. 679.

§ 36. One *Savage* being ſeiſed in fee, conveyed his eſtate by leaſe and releaſe to truſtees and their heirs, to the uſe of himſelf for 99 years, remainder to truſtees for 25 years, remainder to the heirs-male of his own body; it was determined, that no uſe for life reſulted to *Savage*, becauſe that would be inconſiſtent with the term of 99 years expreſsly limited to him.

Rawley v. Holland, 2 Ab. Eq. 753.

§ 37. *A.* by marriage ſettlement, conveyed certain lands to the uſe of himſelf for 99 years, if he ſo long lived, and, after to the uſe of truſtees for 200 years, remainder to the uſe of the heirs-male of his own body, remainder to his own right heirs.

Upon a caſe referred to the judges of the Court of Common Pleas, from the Court of Chancery, they held, that no eſtate of freehold could reſult to *A.* for his life by implication; becauſe another eſtate. *viz.* for 99 years, if he ſo long lived, was expreſsly limited to him, which would be inconſiſtent with a freehold by implication.

Vide Fearne's Cont. Rem. 52.

No Uſe will reſult againſt the Intent of the Parties.

§ 38. Where there is any circumſtance to ſhew the intent of the parties to have been that the uſe ſhould not reſult, it will remain in the perſons in whom the legal eſtate is veſted.

Hummerſton's caſe, Dyer, 166 *a.* n. 9.

§ 39. A recovery was ſuffered by one *Hummerſton*, to the intent that the recoveror ſhould make an eſtate to him and his wife for their lives, remainder to their eldeſt ſon in tail, *&c.* it was agreed, that after the recovery ſuffered, the recoverors ſhould be ſeiſed to their own

own uſe; for if they were ſeiſed to the uſe of *Hummerſton*, then they could not make the eſtate. But *Southcot* and *Wray* ſaid, they ought to do this in convenient time, otherwiſe the uſe would reſult to *Hummerſton*.

§ 40. A fine was levied, and an indenture, leading the uſes, the words of which were, "The fine was "levied to the intent that they ſhould make an eſtate "to him to whom *J. E.* the father (who was the "cognizor) ſhould name;" and there was a proviſo in the end of the indenture, that the cognizee ſhould not be ſeiſed to any other uſe except unto that uſe ſpecified: and holden by all the juſtices, that it ſhall be to the uſe of the cognizees themſelves immediately as above; and, after the nomination, they ſhall be ſeiſed to the uſe of whomever he names; and if *J. E.* die without nomination, then the law will ſettle the uſe in his heir. Idem.

§ 41. A feoffment was made by *A.* upon condition to reconvey to *A.* for life, remainder to the eldeſt ſon of *A.* in fee; it was reſolved, that no uſe reſulted to *A.*, for, if ſo, then the eſtate would veſt by the ſtatute of uſes; and the feoffee could not make an eſtate to *A.* and to his ſon. Winnington's caſe, Jenk. Cent. 6. Ca. 44.

§ 42. A tenant in tail levied a fine to *J. S.* and his heirs, in order to make him tenant to the *præcipe* in a common recovery, but no uſe was declared on the fine. Seven years after, a writ of entry was brought againſt Altham v. Angleſey, Gilb. Rep. 16.

J. S., who vouched the cognizor of the fine, and a common recovery was thus ſuffered. The queſtion was, whether *J. S.* had an eſtate of freehold in him at the time of the recovery.

It was contended, that although the legal eſtate paſſed by the fine to *J. S.*, yet, as no uſe was declared, it reſulted back to the original owner of the eſtate: ſo that *J. S.* had no eſtate in the lands when the recovery was ſuffered, and therefore was not a good tenant to the *præcipe*. But it was held by Lord *Holt* and all the other judges, that when a fine was levied, or a feoffment made to a man and his heirs, the eſtate was in the cognizee or feoffee, not as an uſe, but by the common law, and might be averred to be ſo. And as in this caſe, the intention of the fine plainly appeared to be, for the purpoſe of making a tenant to the *præcipe*, the uſe and eſtate ſhould be allowed to have veſted in *J. S.*, and not to have reſulted to the cognizor of the fine.

No Uſe reſults but to the Owner.

§ 43. It follows, from the nature of reſulting uſes, and uſes by implication, that they can never ariſe to any perſon but the original owner of the eſtate.

Davies v. Speed, Show. Ca. in Parl. 104.

§ 44. Huſband and wife levied a fine of the wife's eſtate, to the uſe of the heirs of the body of the huſband on the wife begotten, remainder to the huſband in fee; the court held, that no eſtate for life could reſult to the huſband, becauſe the eſtate originally belonged to the wife.

§ 45. Where

§ 45. Where a tenant in tail ſuffers a recovery of his eſtate, by which it is converted into an eſtate in fee-ſimple, without declaring any uſes thereof, it has been doubted whether the uſe which reſults to him is in tail or in fee. The language of the old books is, that where there is a feoffment, fine, or recovery, without conſideration or declaration of uſes, theſe aſſurances ſhall enure to the old uſes. What Uſe reſults to a Tenant in Tail.

§ 46. In the caſe of *Argol* v. *Cheney*, a father tenant for life, and the ſon tenant in tail, joined in ſuffering a common recovery; but the father only executed the deed declaring the uſes. The court directed the jury to find the uſes according to the eſtates which the parties had at the time of ſuffering the recovery. Latch. 82.

§ 47. In the caſe of *Waker* v. *Snow*, a father tenant for life, and the ſon tenant in tail, ſuffered a common recovery, without any declaration of the uſes to which it ſhould enure; it was held, that the recovery ſhould enure to the former uſes. Palm. 359.

§ 48. The doctrine laid down in the above caſes is liable to great objections; for, as reſulting uſes are guided by the intent of the parties, where a tenant in tail ſuffers a recovery without any declaration of uſes, the preſumption is, that this act was done for the purpoſe of acquiring the abſolute dominion over his eſtate, as it cannot be ſuppoſed that he would go to the expence of ſuffering a recovery, if he is only to acquire 9 Rep. 11 *a*. Gilb. Uſes, 64.

the ſame eſtate which he had before. And it has been eſtabliſhed by the following modern determinations, that where a tenant in tail ſuffers a common recovery, without any declaration of uſes, the reſulting uſe is to him in fee ſimple.

Nightingale v. Ferrers, 3 P. Wms. 207.

§ 49. The Earl of *Ferrers* being tenant for life, with remainder to his firſt and other ſons in tail male, and having an eldeſt ſon *Robert*, who was about 17 years old, and ſeveral other ſons; a very advantageous match had been agreed on between ſuch eldeſt ſon and a young lady, and articles were entered into by Lord *Ferrers* and his ſon, whereby Lord *Ferrers* covenanted that he and his ſon ſhould, within a year after his ſon came of age, by fine or recovery, ſettle the bulk of his eſtate to the uſe of the ſon for life, remainder to his firſt and other ſons in tail, &c.

The marriage took effect, and the eldeſt ſon *Robert*, when he came of age, joined with his father in levying a fine and ſuffering a common recovery; but there was no declaration of uſes. The ſon died, leaving an only daughter, and no ſon. It appears from the caſe, that the eſtates of which the recovery was ſuffered, deſcended to the only daughter of *Robert* the ſon, who had joined his father in the recovery, and had not declared any uſes of the recovery. Now, if the recovery had enured as to *Robert* the ſon's eſtate, to the old uſes, he would have been tenant in tail male, with remainder to his brothers in tail male ſucceſſively; and, upon his death without iſſue male, the eſtate would have veſted in

in his next brother, and not in his daughter: but it appears to have been ſo fully admitted by the counſel of the Lord *Ferrers*, who was party to that ſuit, and who was a younger brother of *Robert* the ſon, who ſuffered the recovery, that, in caſe of no declaration of uſes, the uſe and eſtate reſulted to *Robert* the ſon in fee; that the only point for which they contended, was, that the articles executed by *Robert* the ſon while an infant, and under which they claimed, amounted to a good declaration of the uſes of the recovery.

§ 50. This doctrine has been confirmed by the higheſt modern authorities. Thus, Lord *Hardwicke* is reported to have ſaid,—"I take it for law, that a "tenant in tail ſuffering a recovery, is in of the old "uſe, and that the eſtate is diſcharged of the ſtatute "*De Donis.*" And, in another caſe, "A common "recovery will bar the entail, though there is no deed "to lead the uſes; becauſe it is in reſpect of the ſa-"tisfaction of eſtate in value which creates the bar." And Lord Chief Juſtice *Lee* is reported to have ſaid,—"It is the uſe of the fee-ſimple that paſſes to the re-"coveror from tenant in tail, and which reſults to him "and his heirs, if no uſe is declared."

1 Atk. 9.

3 Atk. 313.

5 Term Rep. 107. note.

§ 51. It follows from this doctrine, that where a tenant in tail levies a fine, without any declaration of uſes, he acquires a baſe fee, deſcendible to his heirs, as long as he has heirs of his body.

No Uſe reſults on a Grant of an Eſtate in Tail for Life or Years.

Bro. Ab. Feoff. al Uſe, pl. 10. Dyer, 146 *b.* Perk. ſ. 534.

§ 52. The doctrine of reſulting uſes only extends to thoſe caſes where an eſtate in fee-ſimple is conveyed. For if a perſon conveys an eſtate to another in tail, without any conſideration or declaration of uſes, no uſe will reſult to the donor; and, conſequently, the donee in tail will hold to his own uſe. For by a gift of this kind, there is a tenure created between the donor and the donee in tail, which amounts to a conſideration, and prevents the uſe from reſulting; in the ſame manner as if a feoffment in fee had been made before the ſtatute of *quia emptores terrarum*, the feoffee would have held the land to his own uſe; becauſe a tenure was thereby created, in conſequence of which, he would have held of the feoffor by fealty at leaſt.

Perk. ſ. 535 *b.* Bro. Ab. Feoff. al Uſe, pl. 10.

§ 53. In the ſame manner, if a perſon leaſes lands to another for life or years, no uſe will reſult to the leſſor. So, if a leſſee for life or years grants over his eſtate, without any declaration of uſe, the grantee will

65. have it to his own uſe. In *Gilbert's Uſes*, the reaſon given for this doctrine, is, that theſe leſſer eſtates were not uſed to be delivered to be kept for the future ſupport and proviſion of the family; and, therefore, the mere act of delivering poſſeſſion, paſſed a right, without conſideration, ſince there was no preſumption from the uſe of the country, that theſe eſtates were tranſferred under ſecret truſts; eſpecially ſince rents were uſually reſerved, and they were ſubject to waſte and other forfeitures.

§ 54. In

§ 54. In the caſe of a conveyance of an eſtate for life or years without conſideration, although a uſe ſhould be declared of part of the eſtate to the grantee, yet there will be no reſulting uſe.

§ 55. *A.* being tenant for life, granted his eſtate to *B.* by fine, and, by indenture, limited the uſe to *B.* for the life of *A.* and *B.*; and if he died, living *A.*, that it ſhould remain to *C.*; afterward *B.* died, living *A.*; *C.* entered, and let to *D.* for years, and died, living *A.* The queſtion was, whether the leſſee ſhould retain the land, as an occupant, during the life of *A.*, or that *A.* ſhould have it again as a reſulting uſe. Caſtle v. Dod, Cro. Ja. 200.

" It was adjudged, after argument, that *C.* ſhould " have it as an occupant, and that *A.* had not any " reſidue of the uſe in him: for, although where te- " nant in fee makes a deed of feoffment, and limits " the uſe for life or in tail, and doth not ſpeak of the " reſidue, it ſhall be to the feoffor or conuſor, becauſe " he had the antient uſe in him in fee; yet when te- " nant for life, or he who hath a particular eſtate, " grants his eſtate by fine, and limits the uſe for years, " or for a particular eſtate, it ſhall not return to him, " but be to the conuſee, although the fine were with- " out any conſideration; becauſe he who hath the " particular eſtate by fine, is ſubject to the antient " rent and forfeiture, which is a ſufficient conſideration " to convey the eſtate to him."

No Uſe reſults on a Deviſe.

Bro. Ab. Feoff. al Uſe, pl. 10.

§ 56. As a deviſe imports a bounty, it follows that it muſt be to the uſe of the deviſee, unleſs otherwiſe expreſſed; and that no uſe can in any caſe reſult to the heirs of the deviſor, unleſs it appears by the will itſelf that the deviſe was not made to the uſe of the deviſee.

TITLE

TITLE XII.

TRUST.

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Of the Origin and Nature of Truſts.

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Of the Rules by which Truſt Eſtates of Freehold are governed.

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Of the Rules by which Truſt Terms are governed.

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CHAP. I.

Of the Origin and Nature of Truſts.

§ 1. *Origin of Truſts.*
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Section

Section 1.

Origin of Truſts.

1 Rep. 124 *a.*

THE object and intention of the ſtatute 27 *Hen.* 8. c. 10. certainly was, to deſtroy that double property in land, which had been introduced into the *Engliſh* law by the invention of uſes; and for that purpoſe the ſtatute enacted, that the legal ſeiſin and poſſeſſion ſhould be transferred and annexed to the uſe. If, therefore, the intention of the legiſlature had been carried into full effect, no uſe could ever afterwards have exiſted for more than an inſtant. But the ſtrict conſtruction which the judges put on that ſtatute defeated, in a great reſpect, its intent; as they determined that there were ſome uſes to which the ſtatute did not transfer the poſſeſſion. By this means uſes were not entirely aboliſhed, but ſtill continued ſeparate and diſtinct from the legal eſtate; and were taken notice of and ſupported by the Court of Chancery, under the name of *Truſts*.

Vaugh. R. 50.
1 Atk. R. 391.

§ 2. A truſt is therefore a uſe not executed by the ſtatute 27 *Hen.* 8.; for originally the words uſe and truſt were perfectly ſynonimous, and are both mentioned in the ſtatute. But as the proviſions of that ſtatute were not deemed co-extenſive with the various modes of creating uſes, ſuch uſes as were not provided for by the ſtatute, were left to their former juriſdiction.

1 Black. R. 136.

Deſcription of a Truſt.

§ 3. Theſe are the circumſtances to which truſt eſtates owe their origin, and from which it follows that a truſt eſtate may be deſcribed to be, a right in equity to take the rents and profits of lands, whereof the legal eſtate

eſtate is veſted in ſome other perſon; and to compel the perſon thus ſeiſed of the legal eſtate, who is called the truſtee, to execute ſuch conveyances of the land as the perſon entitled to the profits, who is called the *ceſtuique* truſt, ſhall direct; and, in the mean time, the *ceſtuique* truſt, when in poſſeſſion, is tenant at will to the truſtee. 1 Show. 73.

§ 4. There are three direct modes of creating a truſt. The firſt ariſes from a rule which was eſtabliſhed ſo early as in 4 and 5 *Phil.* and *Mary*, that an uſe could not be limited on an uſe: and the reaſon given by Lord *Bacon* for this determination is, becauſe the words of the ſtatute are, "where any perſon is ſeiſed of any lands or tenements," which excludes uſes, as they do not fall under either of theſe deſcriptions. A Uſe limited upon a Uſe. Tyrrell's caſe, Dyer, 155 *a*. Read. 43.

§ 5. Thus, if in conſideration of a ſum of money paid by *C.*, a feoffment was made to *A.* and his heirs, to the uſe of *B.* and his heirs, to the uſe of or in truſt for *C.* and his heirs, the judges held that the ſtatute would transfer the legal eſtate to the firſt uſe, that is to *B.*; and that the ſecond uſe limited to *C.* was a mere nullity, becauſe a uſe could not be limited on a uſe. Not adverting, as Sir *William Blackſtone* obſerves, that "the inſtant the firſt uſe was executed in *B.*, he "became ſeiſed to the uſe of *C.*, which ſecond uſe the "ſtatute might as well be permitted to execute as it "did the firſt; and ſo the legal eſtate might be in-"ſtantaneouſly tranſmitted down through a hundred "uſes, till finally executed in the laſt *ceſtuique* uſe." 2 Comm. 336.

§ 6. Although

§ 6. Although the courts of common law determined that, in ſuch a caſe as that which has been ſtated, the limitation to *C.* was void; yet, as it was evident that *B.* was not intended to be benefited by that conveyance, and as *C.* had given a valuable conſideration for the land, the Court of Chancery immediately took cognizance of the caſe, and decreed that *B.* ſhould pay the rents and profits of the land to *C.*, and ſhould execute ſuch conveyances of it as *C.* ſhould direct.

Whetſtone v. Bury, 2 P. Wms. 146.

§ 7. In a ſettlement before marriage, lands were conveyed to truſtees and their heirs, to the uſe of them and their heirs, to the uſe of the huſband for life, *&c.* it was decreed, that the legal eſtate was veſted in the truſtees; and therefore that the limitations to the huſband, *&c.* were but truſts, which could not be executed by the ſtatute.

Attor. Gen. v. Scot. Forreſt. Rep. 138.

§ 8. *Ann Ratford*, being ſeiſed in fee of certain lands, conveyed them to *Thomas Baker* and his heirs, to the uſe of him and his heirs, in truſt to permit the ſaid *Ann* and her huſband to receive the profits during their lives, *&c.*

It was decreed by Lord *Talbot*, that as the eſtate was limited to truſtees and their heirs, ſo that it was actually executed in the truſtees, whatever came afterwards could be looked upon only as an equitable intereſt; for there could not be an uſe upon an uſe.

Venables v. Morris, 7 Term Rep. 342. 438.

§ 9. An eſtate was limited by deed and fine to the uſe of the huſband for life, remainder to truſtees and their

their heirs during his life, to preſerve contingent remainders, remainder to the wife for life, remainder to the truſtees and their heirs (not ſaying during her life), in truſt to ſupport the contingent uſes and eſtates therein-after limited, remainder over. Upon a caſe ſent from the Court of Chancery, the Court of King's Bench certified, that the truſtees took a legal eſtate in fee after the determination of the wife's life eſtate, and that all the ſubſequent limitations were truſt eſtates.

§ 10. In the caſe of a deviſe, the rule is the ſame. Thus, where *John Hopkins* deviſed his real eſtate to truſtees and their heirs, to the uſe of them and their heirs, upon ſeveral truſts, it was decreed by Lord *Hardwicke*, that the legal eſtate was veſted in the truſtees, and that the deviſees only took truſt eſtates.

Hopkins v. Hopkins, 1 Atk. 581.

Marwood v. Darrell, Ca. Temp. Hard. 91. S. P.

§ 11. It follows from the principles here laid down, that if lands are conveyed by covenant to ſtand ſeiſed, bargain and ſale, or appointment under a power, to *A.* and his heirs, the legal eſtate will be veſted in *A.*, and *B.* will only take a truſt.

Vide Tit. 32. ch.

§ 12. The ſecond mode of creating a truſt aroſe from an opinion which was delivered by the judges in 36 *Hen.* 8., that although a feoffment to a man for life, and after his deceaſe that *J. N.* ſhould take the profits, was clearly an uſe, and executed by the ſtatute, yet if it had been that after his death the feoffees ſhould receive the profits and pay them over to *J. N.*, this would not be executed by the ſtatute; becauſe *J. N.* could

Limitation to Truſtees to pay over the Rents.

Bro. Ab. Feoff. al Uſe, pl. 52.

1 Ab. Eq. 383.

receive nothing but through the hands of the truſtees, and therefore *J. N.* could only take a truſt eſtate.

§ 13. A diſtinction has been made between a deviſe to a perſon in truſt to pay over the rents and profits to another, and a deviſe in truſt to permit ſome other perſon to receive the rents and profits. In the firſt caſe, we have ſeen, it was determined that the legal eſtate ſhould continue in the firſt deviſee, in order that he might be able to perform the truſt; for, where he is directed to pay over the rents and profits, he muſt neceſſarily receive them: but, in the ſecond caſe, it has been adjudged, that the legal eſtate is veſted by the ſtatute in the perſon who is to receive the rents and profits.

Broughton v. Langley, 1 Salk. 678.

§ 14. Lands were deviſed to truſtees and their heirs, to the intent and purpoſe to permit *A.* to receive the rents and profits for his life, *&c.*

It was determined by Lord Chief Juſtice *Holt*, that this would have been a plain truſt at common law, and what at common law was a truſt of a freehold or inheritance, is executed by the ſtatute, which mentions the word truſt as well as uſe. And that the caſe of *Burchett* v. *Durdant*, which had been determined otherwiſe, was not law.

2 Vent. 312.

Fearne's Op. 422.

§ 15. It follows from the preceding caſes, that whenever an eſtate is conveyed or deviſed to truſtees, and they are required to do any act to which the ſeiſin and poſſeſſion of the legal eſtate is neceſſary, although they

they ſhould be directed to permit the rents and profits to be received by another perſon, ſtill that perſon will only be entitled to a truſt eſtate: for, otherwiſe, the truſtees would not have the means of executing the truſt.

§ 16. *Joſeph Bliſſett* deviſed all his freehold, copyhold, and leaſehold, and all his real and perſonal eſtate, to three truſtees, their heirs, executors, and aſſigns, in truſt to pay his ſon *Iſaac Bliſſett* 37 *l.* quarterly; and if he married with conſent, then double the ſum; and if he ſhould have any child or children, he gave the reſt and reſidue of the yearly rents and profits of his ſaid truſt eſtate, over and above the ſaid yearly payments, to be applied during the life of the ſaid ſon for the education and benefit of ſuch child or children. And then he goes on in theſe words; "I give one "moiety of the ſaid truſt eſtate to ſuch child and "children of my ſaid ſon as he ſhall leave, their re- "ſpective heirs, executors, and aſſigns, and to the "ſurvivor; and the other moiety I give to the child "and children of my grandſon *Joſeph Dickenſon*, and "every other child and children of my daughter, their "heirs and aſſigns." Then, in caſe *Iſaac* die without iſſue, the firſt moiety to *Joſeph Dickenſon* and other child and children of *Sarah*, and their heirs, *&c.* Then, by another clauſe, he appointed 100 *l. per annum* as a jointure to any wife his ſon *Iſaac* ſhould marry, in caſe he married with conſent; and gave to his ſaid grandſon *Joſeph Dickenſon* 30 *l. per annum* for his maintenance until his age of fifteen, and then 200 *l.* to put him out apprentice.

Chapman v. Bliſſett, Forreſt. 145.

One of the queſtions in this caſe was, whether the truſtees took the legal eſtate, and continued to hold it after the death of *Iſaac*.

Lord *Hardwicke*,—" The whole depends upon the " teſtator's intent as to the continuance of the eſtate " deviſed to the truſtees, whether he intended the " whole legal eſtate to continue in them, or whether " only for a particular time or purpoſe: if an eſtate " be limited to *A.* and his heirs, in truſt for *B.* and " his heirs, then it is executed in *B.* and his heirs: " but where particular things are to be done by the " truſtees, as in this caſe, the ſeveral payments that are " to be made to the ſeveral perſons, it is neceſſary that " the eſtate ſhould remain in them, ſo long at leaſt as " thoſe particular purpoſes require it. No authority " has been cited to warrant the doctrine, that in caſe " of ſuch a general limitation to truſtees, as the pre- " ſent caſe is, that they ſhould have but a particular " intereſt, and then that intereſt to determine; ſuch a " caſe might indeed be framed, but was never intended " here, there being many purpoſes to take effect, which " might endure longer than the life of *Iſaac*; and the " taking it in ſo confined a ſenſe, would be making " a forced conſtruction to diſappoint the teſtator's in- " tent, which was to make an entire diſpoſition of the " legal eſtate to the truſtees."

Shapland v. Smith, 1 Bro. R. 75.

§ 17. Lands were deviſed to truſtees upon truſt, that they ſhould every year after deducting rates, taxes, repairs, and expences, pay ſuch clear ſum as ſhould then remain to *A. B.*; it was decreed by Lord *Thurlow*, that

that the truſtees being to pay the taxes and repairs, muſt have an intereſt in the premiſes, and, therefore, that the legal eſtate was veſted in them. Vide Fearne's Op. 421.

§ 18. A perſon deviſed lands to truſtees and their heirs, upon truſt to take and receive the rents, iſſues, and profits, and to apply the ſame for the ſubſiſtence and maintenance of his ſon during his life. Silveſter v. Wilſon, 2 Term R. 444.

It was determined, that the ſon had only a truſt eſtate.

§ 19. Where an eſtate is deviſed to truſtees for the ſeparate uſe and benefit of a married woman, the courts will, if poſſible, conſtrue the deviſe, ſo as to veſt the legal eſtate in the truſtees; becauſe ſuch a conſtruction will beſt effectuate the intention of the teſtator. Truſt for the ſeparate Uſe of a married Woman.

§ 20. Lands were given by will to truſtees and their heirs, in truſt for a married woman and her heirs, and that the truſtees ſhould, from time to time, pay and diſpoſe of the rents and profits to the ſaid married woman, or to ſuch perſon or perſons, as ſhe ſhould direct. This was decreed to be a truſt eſtate in the married woman, and not a uſe executed by the ſtatute. Neville v. Saunders, 1 Vern. 415.

§ 21. A teſtator gave all the rents and profits of certain lands to a married woman during her life, to be paid by his executors into her own hands, without the intermeddling of her huſband. The queſtion was, whether this deviſe paſſed the legal eſtate in the lands to the wife. South v. Alcine, 1 Salk. 228. 5 Mod. 63. 101.

Lord Chief Juſtice *Holt* was clearly of opinion, that the executors took the legal eſtate as truſtees for the wife; but the other judges were of a contrary opinion. The doctrine here laid down by *Holt*, was, however, fully eſtabliſhed in the following caſe.

Say and Sele v. Jones, 1 Ab. Eq. 383. 8 Vin. Ab. 262.

§ 22. Lands were deviſed to truſtees and their heirs, in truſt to pay ſeveral legacies and annuities, and then to pay the ſurplus of the rents and profits to the proper hands of a married woman, or to ſuch perſon or perſons as ſhe ſhould by any writing or writings direct, during her life; and, after her deceaſe, that the truſtees ſhould ſtand ſeiſed to the uſe of the heirs of her body, with remainders over. It was decreed, (and the decree affirmed in the Houſe of Lords), that this was a uſe executed in the truſtees and their heirs, during the life of the married woman, who had only a truſt eſtate in the ſurplus rents and profits; but that, after her deceaſe, the legal eſtate veſted in the heirs of her body.

2 Bro. Parl. Ca. 113.

Beable v. Dodd, 2 Term R. 393. 7.

Harton v. Harton, 7 Term R. 652.

§ 23. In this caſe, the direction to the truſtees to pay annuities, and the truſt to pay only the ſurplus, would alone have juſtified the decree. But in a modern caſe, ſent from the Court of Chancery, where an eſtate was deviſed to truſtees and their heirs, upon truſt "to "permit and ſuffer the teſtator's niece, who was mar-"ried, to receive and take the rents and profits of all "the ſaid premiſes during her life, for her own ſole "and ſeparate uſe, notwithſtanding her coverture, and "and without being in anywiſe ſubject and liable to "the debts, &c. of her then, or any after-taken huſ-

"band;

" band; and her receipt alone, from time to time, to " to be a ſufficient diſcharge for the ſame."

Lord *Kenyon* ſaid, " whether this be a uſe executed " in the truſtees or not, muſt depend upon the inten- " tion of the deviſor, which is to be collected from " the will. This proviſion, it appears, was made in " order to ſecure to the ſeveral feme coverts a ſeparate " allowance, free from the controul of their huſbands, " to effectuate which, it is eſſentially neceſſary that the " truſtees ſhould take the eſtate with the uſe executed; " otherwiſe the huſband of each taker would be " entitled to receive the profits, and ſo defeat the very " object that the deviſee had in view." And the court certified, " that the legal eſtate by way of uſe executed, " in fee-ſimple, veſted in the truſtees: that conſtruc- " tion being neceſſary, (as they conceived), to give " legal effect to the teſtator's intention, to ſecure the " beneficial intereſt to the ſeparate uſe of the ſeveral " femes covert."

§ 24. Where lands are deviſed to truſtees in truſt to ſell, or in truſt to raiſe money to pay debts, or for any other purpoſe, and ſubject thereto, in truſt for a third perſon, the truſtees will take the legal eſtate, for otherwiſe it would not be in their power to execute the truſt.

Truſt to ſell or to raiſe Money.

§ 25. A perſon deviſed all his lands to five truſtees, their heirs and aſſigns, in truſt that they and their heirs ſhould, in the firſt place, by the rents and profits, or by ſale or mortgage of the premiſes, raiſe ſo much as

Bagſhaw v. Spencer, 1 Veſ 142. Collect Jur. vol. 1. 378.

ſhould be neceſſary for the payment of his debts; and after payment thereof, gave the ſame unto his truſtees for 500 years, without impeachment of waſte upon truſt, as after mentioned: and then goes on in theſe words; "and from and after the determination of the ſaid eſtate "for years, then I give and deviſe all my ſaid lands, "*&c.* unto my ſaid truſtees, their heirs and aſſigns, "my mind being, that my ſaid truſtees ſhall be and "ſtand ſeiſed of the ſaid premiſes, in truſt to the ſe- "veral uſes and behoofs, intents and purpoſes after "declared, viz.; as for one moiety of the ſaid pre- "miſes, I give and deviſe the ſame to the uſe and be- "hoof of my nephew *T. Bagshaw*, for the term of his "natural life, *&c.* and then as to one moiety, upon "truſt and to the uſe of his nephew for life." One of the queſtions in this caſe was, whether the eſtate deviſed to the nephew was a legal or a truſt eſtate.

Lord *Hardwicke* was of opinion, that the deviſe of a moiety to the nephew was merely a truſt in equity, the firſt deviſe being to the truſtees and their heirs, it carried the whole fee, in point of law: part of their truſt was to ſell the whole, or a ſufficient part thereof, for payment of debts and funeral expences. This would have carried a fee by conſtruction, had the word heirs been omitted out of the deviſe, becauſe the truſt is to continue for ever, and to ſell and convey a fee.

Kenrick v. Lord W. Beauclerc, 3 Boſ. & Pul. Rep. 175.

§ 26. A perſon deviſed his eſtates thus: And as to my real and perſonal eſtate, ſubject to and charged with my juſt debts, I give and diſpoſe thereof as follows; (that is to ſay), I give, deviſe, and bequeath my

real eſtates, and alſo my perſonal eſtate, unto *J. M.* and *O. W.*, and their heirs, upon truſt, and to and for the ſeveral uſes, truſts, intents, and purpoſes following, (that is to ſay), to the intent that the ſaid *J. M.* and *O. W.* ſhall and do in the firſt place apply and diſpoſe of my perſonal eſtate in payment of all my juſt debts; and as to all my real eſtates ſubject to my debts, and ſuch charges as I may now or at any time hereafter think proper to make, I give, deviſe, and bequeath the ſame to *R. P.* for and during his life, *&c.*

The Court of Common Pleas, to whom this caſe was ſent from the Court of Chancery, certified that the truſtees did not take any eſtate at law, in the real eſtates deviſed by the ſaid will, the court being of opinion, that this was a mere deviſe charged with the payment of debts; and it did not appear on the face of the will, that the teſtator intended the truſtees ſhould be active in paying the debts. It would, indeed, be more convenient, (ſaid the court), that the legal eſtate ſhould be veſted in truſtees for the payment of the debts, than that the truſt ſhould be executed by the deviſee, under the direction of a court of equity; for a court of equity could not enable the deviſee to make a complete title to the eſtate. But this was only an argument *ab inconvenienti*, from which they could not conſtrue the teſtator to have ſaid what in fact he had not ſaid.

A Truſt after Payment of Debts veſts immediately.

§ 27. Where an eſtate is conveyed or deviſed to truſtees and their heirs, upon truſt to pay debts generally, or to pay ſuch debts as are particularly ſpecified,

Vide Colleſt. Jur. vol. 1. 214.

and after payment of ſuch debts, and when ſuch debts ſhall be paid, then in truſt for *A. B.*, or in truſt to convey ſuch parts of the premiſes as ſhall remain unſold to *A. B.*, in either of thoſe caſes, *A. B.* has an immediate truſt eſtate in the ſurplus, upon the execution of the deed, or the death of the teſtator. For, in caſes of this kind, the payment of the debts is not a condition precedent, which muſt be performed before the ſubſequent limitation or deviſe can take effect; but an intereſt commencing at the ſame time, and concurrent with the eſtate given to the truſtees. And the words, *after payment of debts*, or *when the debts are paid*, only denote the order or courſe in which the ſeveral intereſts ſhall take place, in point of actual poſſeſſion and perception of the profits, without preventing the ſubſequent eſtates, whether legal or equitable, from becoming veſted in intereſt, at the ſame time with thoſe which are prior to them in point of limitation.

Terms for Years limited in Truſt.

Dyer, 36, *a.* Poph. R. 76.

§ 28. The third mode of creating a truſt, ariſes from a determination of all the judges in 22 *Eliz.* upon a queſtion put to them by the Lord Chancellor, that where a term for years was granted to *A.* to the uſe of, or in truſt for *B.*, the legal eſtate in the term remained in *A.*, and was not executed in *B.* by the ſtatute of uſes. For the words of that ſtatute are; "where any "perſon is ſeiſed to the uſe of another:" whereas, in this caſe, *A.* is not ſeiſed, not having a freehold, but is only poſſeſſed of the term; the word ſeiſed being only applicable to the poſſeſſion of a freehold eſtate. So that, in caſes of this kind, the *ceſtuique* uſe was driven to the Court of Chancery for his remedy, where the

Bac. Read. 42.

Vide Tit. 8. ch. 1. ſ. 12.

the truſtee was obliged to account with him for the rents and profits of the term.

Of reſulting or implied Truſts.

§ 29. Beſides theſe direct modes of creating a truſt eſtate, there are ſeveral other caſes in which truſt eſtates ariſe from the evident intention of the parties and the nature of the tranſaction, which are enforced by the Court of Chancery, and are uſually called reſulting truſts, or truſts by implication. And in the ſtatute of frauds and perjuries, which enacts, that all declarations and creations of truſts of lands or hereditaments muſt be in writing, it is expreſsly mentioned, ſect. 20, "That all conveyances where truſts and confidences "ſhall ariſe or reſult by implication of law, ſhall be "as if that act had never been made." And it has been determined that this clauſe muſt relate to truſts and equitable intereſts, and cannot relate to a uſe, which is now a legal eſtate.

1 P. Wms. 112.

Contract for a Purchaſe.

§ 30. Where articles are entered into for the purchaſe of an eſtate, a truſt immediately reſults to the purchaſer.

1 Cha. Ca. 39. Acherley v. Vernon, 9 Mod. 78.

Purchaſe in the Name of a Stranger.

§ 31. Where an eſtate is purchaſed in the name of one perſon, and the money or conſideration is paid by another, there is a reſulting truſt in favour of the perſon who paid the conſideration. But in all caſes of this kind, the payment of the money muſt be proved, by clear and undoubted evidence; for, otherwiſe, the Court of Chancery will not interfere.

Lloyd v. Spillet, 2 Atk. 150. Willis v. Willis, 2 Atk. 71.

Gaſcoing v. Thwing, 1 Vern. 366.

§ 32. Sir *Thomas Gaſcoigne* bought an eſtate, and took the conveyance in the name of one *Vavaſor*, who aſſigned to the defendant *Thwing*; and it was ſuggeſted by Sir *Thomas Gaſcoigne*, that the eſtate was bought with his money, and was upon truſt that *Elizabeth Thwing*, (who was then dead), ſhould enjoy it for her life, and then in truſt for Sir *T. G.*, who prayed the eſtate might be conveyed to him. The defendant denied he knew it was bought with the plaintiff's money, but believed it was bought with the proper money of the ſaid *Elizabeth Thwing*, and that the conveyance was in truſt for her and her heirs, and claimed it as heir to her, inſiſting on the ſtatute of frauds, there being no declaration of truſt in writing.

The chief point was, whether when a man purchaſes land with his own money, and takes a conveyance in another man's name, this is ſuch a reſulting truſt by implication of law, as is ſaved by the ſtatute, and needs no declaration of truſt.

After long debate, whether the plaintiff ſhould be admitted to prove the money was his, the proofs were read, and they amounting only to what had paſſed in diſcourſe, the Maſter of the Rolls diſmiſſed the plaintiff's bill, becauſe the proofs were not ſufficient whereon to ground a decree.

Purchaſe by a Truſtee with Truſt-Money.

§ 33. It was formerly doubted, whether in the caſe of a purchaſe made by a truſtee with truſt money, a reſulting truſt would ariſe to the perſon entitled to the money;

money; becauſe that would be to contradict the deed by parol evidence, in direct oppoſition to the ſtatute of frauds. It has, however, ſince been determined, that evidence *aliunde* is admiſſible, to ſhew that the purchaſe was made with the truſt money; and that, where that circumſtance has been clearly proved, a truſt will reſult to the owner of the money. Kirk v. Webb, Prec. in Ch. 84.

§ 34. A bill was brought by the legatees of *John Ryal* againſt the executrix and heir at law of *Jonathan Ryal* for ſatisfaction out of the aſſets againſt the executrix, and as againſt the heir at law, to have ſatisfaction out of an eſtate purchaſed by *Jonathan Ryal*, (as the plaintiff inſiſted), with the aſſets of *John Ryal*, the original teſtator. The defendant, the executrix, admitted that, as to one particular eſtate, it appeared by her teſtator's papers, that it was purchaſed with 250 *l.* of the teſtator's money. Proof was read, that *Jonathan Ryal*, after teſtator's death, purchaſed ſeveral eſtates; and that, before that time, he was a poor perſon, and not able to pay for them out of his own money. The counſel for the plaintiff inſiſted, that the heir at law was to be conſidered as a truſtee for them, as far as the eſtate appeared to be purchaſed with the aſſets of *John Ryal*. Ryal v. Ryal, Amb. 413.

On the other ſide, it was argued, that money could not be followed into land.

Lord *Hardwicke*—The court has been very cautious of following money into land, but has done it in ſome caſes. No one would ſay, but the court would, if it was

was actually proved that the money was laid out in land. The doubt with the court, in theſe caſes, has been on the proof. There is difficulty in admitting proof. Parol proof might let in perjury: but it has always been done, when the fact has been admitted in the anſwer of the perſon laying it out. If the executor of *John Ryal* had been a party, and admitted it, there would have been no doubt; but the admiſſion is by his repreſentative, which, though it does not bind the heir, is ground for inquiry. The way of charging the heir is by conſidering him as a truſtee; as, when lands are purchaſed by one in the name of another, it is a reſulting truſt by law, and out of the ſtatute: and, upon inquiry, a little matter will do to make it a charge *pro tanto*. Refer it to the maſter to inquire whether the eſtate was purchaſed with 250 *l.* of the teſtator's money or not.

Lane v. Dighton, Amb. 409.

Conveyance without Conſideration.

§ 35. Where lands are conveyed to a ſtranger without any conſideration, there will be a reſulting truſt for the original owner.

Duke of Norfolk v. Browne, Prec. Ch. 80. 1 Ab. Eq. 381.

§ 36. The Duke of *Norfolk* had executed a grant of the next avoidance of a church, to a clergyman who was much entruſted and employed by him. The grantee knew nothing of the making of this grant, and being examined in a cauſe, depoſed, that he did not purchaſe it of the Duke.

It was decreed to be a reſulting truſt for the grantor, there being no other truſt declared.

§ 37. Where the legal eſtate in lands is conveyed to a truſtee, and a truſt is declared as to part only, nothing being ſaid of the reſt, what remains undiſpoſed of reſults to the real owner.

A Truſt declared in Part.

Lloyd v. Spillett, 2 Atk. 150.

§ 38. In the ſame manner, where the whole of an eſtate is conveyed for particular purpoſes, or on particular truſts only, which, by accident, or otherwiſe, cannot take effect, a truſt will reſult to the original owner, or to his heirs. As, where a teſtator deviſes real eſtates to truſtees, in truſt to ſell, and to apply the purchaſe money in a particular manner, and ſuch purpoſe cannot be effected, the fund, though money, will be conſidered as land, and will reſult to the heir at law.

Prec. in Cha. 162. 541. 3 P. Wms. 20. 252. 1 Vef. 108. Amb. 643.

§ 39. A perſon deviſed her real and perſonal eſtate to truſtees, in truſt to ſell and pay debts and legacies, and to pay the reſidue to five perſons, to be equally divided between them. One of the reſiduary legatees died in the life-time of the teſtatrix.

Digby v. Legard, Cited 3 P. Wms. 22. note.

It was decreed by Lord Chancellor *Bathurſt* in *Trinity* Term 1774, and the decree affirmed at a rehearing, that this was a reſulting truſt, as to the ſhare in the real eſtate of the reſiduary legatee, who died in the teſtator's life-time, for the benefit of the heir at law.

1 Bro. Cha. Rep. 589. 3 —— 355.

§ 40. The rule, that where lands are deviſed for a particular purpoſe, what remains after that purpoſe is ſatisfied reſults, admits of ſeveral exceptions.

§ 41. *Richard*

Hill v. Ep. London, 1 Atk. 618.

§ 41. *Richard Smith* deviſed an advowſon to *Grace Smith*, willing and deſiring her to ſell and diſpoſe of the ſame to *Eton College*, and, on their refuſal, to *Trinity College*, *Oxford*, *&c.* Soon after the death of the teſtator, *Grace Smith* preſented a perſon to the living, upon which, the heirs at law of the teſtator filed their bill, in order that the biſhop might be enjoined from accepting the preſentee of *Grace Smith*; the plaintiffs inſiſting, that the teſtator did not intend the preſent avoidance ſhould go to *Grace Smith*, but that ſhe ought to be conſidered altogether as a truſtee for the heirs at law of the teſtator.

Lord *Hardwicke*— "The general queſtion on this "deviſe is, whether there be a reſulting truſt or not? "In the firſt hearing, I inclined to think that there "was, but I have changed my opinion entirely: the "general rule, that where lands are deviſed for a par- "ticular purpoſe, what remains after that particular "purpoſe is ſatisfied reſults, admits of ſeveral excep- "tions. If *J. S.* deviſe lands to *A.* to ſell them to *B.*, "for the particular advantage of *B.*, that advantage is "the only purpoſe to be ſerved, according to the intent "of the teſtator, and to be ſatisfied by the mere act "of ſelling, let the money go where it will, yet there is "no precedent of a reſulting truſt in ſuch a caſe: nor "is there any warrant from the words or intent of the "teſtator to ſay, this deviſe ſevers the beneficial intereſt, "but is only an injunction on the deviſee to enjoy "the thing deviſed in a particular manner. If *A.* de- "viſes lands to *J. S.* to ſell for the beſt price to *B.*, or

"to

" to leaſe for three years at ſuch a fine, there is no " reſulting truſt. So that the deviſe here amounts to " no more than this; the teſtator gives the advowſon " to *Grace Smith*, but if ſuch or ſuch a college will " buy it, then he lays an injunction upon her to ſell; " and, therefore, there are two objects of the teſta- " tor's benevolence, *Grace Smith* and the colleges."

§ 42. Where a perſon makes a conveyance of a legal eſtate to truſtees, upon ſuch truſts, and for ſuch intents and purpoſes as he ſhall appoint, and no appointment is made, there will be a reſulting truſt for the grantor.

Where no Appointment is made.

Fitzgib. R. 223.

§ 43. Where a father purchaſes lands during the minority of his child, in the name of the child, without any declaration of truſt in the deed, and takes the profits during the minority of the child, ſuch a purchaſe will be conſidered in a court of equity as an advancement for the child, and not as a truſt for the father.

Purchaſe by a Father in the Name of a Child.

The reaſon is, becauſe between a father and his child blood is a ſufficient conſideration to raiſe a uſe. And herein the law of truſts does, as it ought to do, agree with the law of uſes: for, if before the ſtatute 27 *Hen.* 8. a father had made a feoffment to a ſtranger without any conſideration, the uſe reſulted to himſelf; but if he had made a feoffment to his ſon without any conſideration, no uſe would have reſulted to the father. Becauſe blood was a ſufficient conſideration to have veſted the uſe in the ſon. Beſides, as a father is bound

Rep. Temp. Finch, 341.

by

by the law of nature to provide for his child, his purchaſing in the name of his child will be conſtrued, in a court of equity, to be a performance of that obligation; and the taking of the rents and profits, during the minority of the ſon, only implies that the father acted as guardian to the ſon.

Grey v. Grey, Rep. Temp. Finch, 338. 1 Cha. Ca. 296.

§ 44. Lord *Grey* purchaſed the manor of *Goſfield* in the name of his eldeſt ſon, *Thomas Grey*, who died in the life-time of his father. Afterwards Lord *Grey* ſettled his eſtate on himſelf for life, remainder to truſtees to raiſe portions for his younger children. Upon the death of Lord *Grey*, *Ralph*, who was originally the ſecond ſon, claimed this eſtate as heir at law to *Thomas*, his elder brother, upon the principle that this purchaſe was an advancement for *Thomas Grey*, and not a truſt for the father; and it was decreed accordingly.

Mumma v. Mumma, 2 Vern. 19.

§ 45. *Jacob Mumma* purchaſed a copyhold tenement in the name of his eldeſt ſon, an infant of about eleven years old; he afterwards laid out 400 *l.* in improvements, paid the purchaſe money, and the fines, and enjoyed it during his life.

The father ſurrendered this copyhold to the uſe of his will, and deviſed the ſame to the uſe of his wife for life, remainder to his younger children, and made other proviſions for his eldeſt ſon.

Upon the death of the father, the eldeſt ſon recovered this copyhold in ejectment; and a bill was brought by the widow to be relieved, upon the principle

ciple that the eldeſt ſon was only a truſtee for the father.

The Lord Chancellor, however, was of opinion, that as the eldeſt ſon was but an infant at the time of the purchaſe, though the father did enjoy during his life, yet the purchaſe muſt be conſidered as an advancement for the ſon, and not a truſt for the father.

§ 46. A father purchaſed copyhold lands in his ſon's name, who was then 18 years of age, and continued in poſſeſſion until his death. Taylor v. Taylor, 1 Atk. 386.

The queſtion was, whether this ſhould be conſidered as an advancement for the ſon, or a truſt for the father.

Lord *Hardwicke*,—"I am of opinion that it ſhould "be conſidered as an advancement for the ſon; and "found my opinion greatly on the caſe of *Mumma* v. Ante, f. 45. "*Mumma*; and though two receipts are produced "under the ſon's hand, for the uſe of the father, I "think that will not alter the caſe; for the ſon being "then under age, could give no other receipt in diſ- "charge of the tenants who held by leaſe from the "father. And in this caſe I am of opinion that parol "evidence may be admitted, though indeed improper, "when offered againſt the legal operation of a will, "or an implied truſt; but here it is in ſupport of law, "and equity too."

§ 47. A pur-

Scroop v. Scroop, 1 Cha. Ca. 27. Back v. Andrews, Prec. in Cha. 1.

§ 47. A purchaſe by a father in his own name and that of his ſon, has, in ſome inſtances, been deemed an advancement for the ſon, and not a truſt for the father. But this doctrine has been altered by ſome modern determinations.

§ 48. Where a father purchaſes an eſtate in his own name and that of his ſon, a moiety of it will be ſubject to the debts of the father.

Stileman v. Aſhdown, 2 Atk. 477.

§ 49. A father made a purchaſe in his own name, and that of his eldeſt ſon, and their heirs; and another purchaſe in his own name, and that of his younger ſon, and their heirs. The father paid the purchaſe money, and continued in poſſeſſion until the time of his death. A judgment creditor of the father's brought his bill to have ſatisfaction out of theſe eſtates.

It was inſiſted that the ſons took theſe eſtates to their own uſe, as an advancement, and were not truſtees for their father.

Lord *Hardwicke*,—It has been inſiſted on the part of the defendants, that theſe two purchaſes are to be conſidered with reſpect to a moiety, and on account of the ſurvivorſhip, as an advancement of the ſons; and, conſequently, they are entitled to retain the eſtates, and are not liable to the plaintiff's judgment. Now, as to that, the general rule has been admitted, and has been long the doctrine of this court, that notwithſtanding the father pays the whole money, yet, if the

the purchaſe is made in the name of a younger ſon, the heir of the father ſhall not inſiſt it is a truſt for the father. But the preſent caſe differs from this rule or any other that I remember. And if I can find any material difference, I ſhall, in my own judgment, be inclined to relieve the creditor; for though it may be proper *ſtare deciſis*, yet I have thought the caſes have gone far enough in favour of advancements, and that I ought not to carry it further. It muſt be admitted that, in ſome caſes which have been before the court, the father has continued in poſſeſſion, where the purchaſe has been made ſingly in the name of the ſon, and yet held an advancement of the ſon; and for this reaſon, becauſe the father is the natural guardian of the ſons during their minority. Here the purchaſe is in the names of the father and ſon as joint tenants; now this does not anſwer the purpoſe of an advancement, for it entitles the father to the poſſeſſion of the whole till a diviſion, and to a moiety abſolutely even after a diviſion; beſides the father's taking a chance to himſelf, of being a ſurvivor of the other moiety. Nay, if the ſon had died during his minority, the father would have been entitled to the whole, by virtue of the ſurvivorſhip; and the ſon could not have prevented it by ſeverance, he being an infant. Suppoſe a ſtronger caſe, that the father had taken an eſtate in the purchaſe, to himſelf for life, with remainder to his ſon in fee: ſhould this prevail againſt the creditors? No, certainly; for the defendant's father having the profits for life, and the ſon only a remainder, the eſtate would have been liable. A material conſideration for the plaintiff is, that the father

might have other reaſons for purchaſing in joint-tenancy, namely, to prevent dower upon the eſtate and other charges. Then conſider how it ſtands in reſpect of the creditor.—A father here was in poſſeſſion of the whole eſtate, and muſt neceſſarily appear to be the viſible owner of it, and the creditor too would have had a right, by virtue of an *elegit*, to have laid hold of a moiety; ſo that it differs extremely from all the other caſes. Now it is very proper that this court ſhould let itſelf looſe, as far as poſſible, in order to relieve a creditor, and ought to be governed by particular circumſtances of caſes: and what can be more favourable to the plaintiff than that every foot of the eſtate is covered by theſe purchaſes, and unleſs I let him in upon theſe eſtates, the plaintiff has no poſſibility of being paid.

Pole v. Pole, 1 Veſ. 76.

It was decreed, that a moiety of the purchaſes was liable to the debt.

Rep. Temp. Finch, 341. 1 Veſ. 76.

§ 50. Where a ſon is married in the life-time of his father, and by him fully advanced, and in a manner emancipated; there, a purchaſe by the father, in the name of the ſon, may be a truſt for the father, as much as if the purchaſe had been made in the name of a ſtranger; becauſe, in that caſe, all preſumptions and obligations of advancement ceaſe. But where the ſon is not advanced, or but advanced or emancipated in part, there is no room for any conſtruction of an implied truſt; and, without clear proofs to the contrary, it ought to be taken as an advancement to the ſon.

§ 51. It

§ 51. It is laid down by Lord Chief Baron *Gilbert*, that if a father purchaſes in the name of his ſon, who is of full age, which, by the *Engliſh* law, is an emancipation, out of the power of the father; there, if the father takes the profits, or lets leaſes, or acts in any other manner as the owner of the eſtate, the ſon will be conſidered as a truſtee for the father; becauſe there is the ſame reſulting truſt as if the ſon were a ſtranger, ſince it was purchaſed with the father's money. Lex Prætor. 271.

§ 52. But if the father had let the ſon continue in poſſeſſion from the time of the purchaſe, without acting as owner, it would be an advancement. For the legal intereſt being in the ſon, and the father permitting him to act as owner of the eſtate from the time of the purchaſe, does as much declare the truſt for the advancement of the ſon, as if it had been declared in expreſs words by the deed. Id.

§ 53. A purchaſe by a grandfather in the name of his grandchild, provided the father is dead, in which caſe the grandchildren are in the immediate care of the grandfather, will be deemed an advancement for the grandchild, and not a truſt for the grandfather. Ebraud v. Dancer, 2 Cha. Ca. 26. Lloyd v. Read, 1 P. Wms. 608.

§ 54. Where a perſon purchaſed a copyhold eſtate in the names and for the lives of his three natural daughters, who were admitted and ſtiled his daughters on the admiſſion, Mr. *Fearne* was inclined to the opinion, that the daughters were entitled to the eſtates for their own uſe. Fearne's Op. 327.

Purchaſe in the Name of a Wife.

Kingdom v. Bridges, 2 Vern. 67.

§ 55. A wife cannot be a truſtee for her huſband; and, therefore, if a huſband purchaſes lands, in the name of his wife, it ſhall be preſumed, in the firſt inſtance, to be an advancement and proviſion for the wife.

Renewal of a Leaſe by a Truſtee.

1 Cha. Ca. 191. 1 Vern. 276. 484.

§ 56. It has been long ſettled, that where a truſtee for an infant, or for any other perſon, takes a renewal of a leaſe in his own name, the renewed leaſe ſhall, in equity, be ſubject to the former truſt. This doctrine is founded on general policy to prevent fraud; for as the truſtee's ſituation, in reſpect to the eſtate, gives him acceſs to the landlord, it would be dangerous to permit him to make uſe of that acceſs for his own benefit.

Keech v. Sandford, Sel. Ca. in. Cha. 61.

§ 57. A leaſe of the profits of a market was deviſed to a truſtee, in truſt for an infant. Before the expiration of the term, the truſtee applied to the leſſor for a renewal, for the benefit of the infant, which he refuſed, in regard that it being only the profits of a market, there could be no diſtreſs, and the only ſecurity for the payment of the rent would be a covenant, which the infant could not enter into. There was clear proof of the refuſal to renew, on which the truſtee took a leaſe for his own benefit.

It was decreed by Lord Chancellor King, that the leaſe ſhould be aſſigned to the infant, that the truſtee ſhould account for the profits ſince the renewal, and ſhould be indemnified from the covenants in the leaſe. His Lordſhip ſaid, he muſt conſider this as a truſt for the

the infant; for if a truſtee, on a refuſal to renew, might have a leaſe to himſelf, few truſt eſtates would be renewed to the *ceſtuique* truſt. That the truſtee ſhould rather have let it run out, than to have taken a leaſe for himſelf. That it might ſeem hard that the truſtee was the only perſon of all mankind who might not have the leaſe; but it was very proper that rule ſhould be ſtrictly purſued, and not in the leaſt relaxed; for it was very obvious what would be the conſequence of letting truſtees take leaſes on a refuſal to renew to the *ceſtuique* truſt.

Killick v. Flexney, 4 Bro. Rep. 161.

§ 58. This doctrine has alſo been applied to perſons having only a particular and limited intereſt in a leaſehold eſtate.

§ 59. Thus, where a tenant for life of a crown leaſe, under a marriage ſettlement, got a renewal of the leaſe in reverſion, it was decreed by Lord Chancellor *Camden*, that it ſhould go to the uſes of the ſettlement.

Taſter v. Marriott, Amb. Rep. 668. 734.

§ 60. It ſhould, however, be obſerved, that there can be no implied truſt between a leſſor and leſſee; becauſe every leſſee is a purchaſer by his contract and his covenants, which excludes all poſſibility of implying a truſt for the leſſor: and, therefore, if in that caſe, there be any truſt at all, it muſt be declared in writing.

No Truſt between a Leſſor and Leſſee.

Pilkington v. Bayley, 7 Bro. Parl. Ca. 383.

§ 61. Where any fraud is committed in obtaining a conveyance, the grantee, in ſuch conveyance, will

Where there is Fraud, a Truſt ariſes.

be conſidered in equity as a truſtee for the real owner.

Fearne Cont. Rem. 479.

§ 62. Thus, where a perſon purchaſes of a truſtee, with notice of the truſt, he is guilty of fraud, even though he ſhould pay a valuable conſideration; and is therefore conſidered as a truſtee for the perſon entitled to the beneficial intereſt. For, as Lord *Hardwicke* ſays, "if a perſon will purchaſe, with notice of another's "right, his giving a conſideration will not avail him, "for he throws away his money voluntarily and of his "own free will."

Vide Treat. of Eq. b. 2. c. 6. ſ. 2.

Truſts of Copyholds.

Tit. 11. ch. 3. ſ. 28.

§ 63. It has been ſtated, that the ſtatute of uſes does not extend to copyhold eſtates; and, therefore, if a copyhold is ſurrendered to *A.*, to the uſe of *B.*, the legal eſtate will not be transferred to *B.*, but he will be entitled in equity to the rents and profits, and to call upon *A.* for a ſurrender of the eſtate.

Howe v. Howe, 1 Vern. 415.

§ 64. Where copyhold eſtates are granted for lives, the perſon who pays the conſideration or the fines will be deemed the real owner; and the other perſons, whoſe names are inſerted in the grant, will be deemed truſtees for him.

Benger v. Drew, 1 P. Wms. 780.

§ 65. Copyhold lands were granted to the huſband and wife and *J. S.* for their ſeveral lives *ſucceſſivè*, and by the copy it appeared that the fine was the money of the huſband and wife.

Lord

Lord Chancellor.—" This third perſon (*J. S.*) " named in the grant, is in equity to be intended but " as a truſtee for the huſband and wife and the ſurvivor " of them, by whom the purchaſe money was advanced; " and it being mentioned in the copy that the fine was " paid by the huſband and wife, is ſtrong evidence of " the facts being ſo; which, though the court will not " look upon as concluſive, yet any evidence given to " contradict it, ought, in order to prevail, to be very " clear and full."

§ 66. By the cuſtom of the manor of *A.*, copyholds were grantable for three lives *ſucceſſive ſicut nominantur*. One *Price*, being the laſt life in an old copy, the lord of the manor (as appeared in evidence) adviſed him to renew; and, upon that, he enquired after two healthy young perſons, and named the defendants *Harris* and *Bowles*, and a copy was granted to hold to them *ſucceſſivè*. It alſo appeared on the copy, that the fine, which was 120 *l.*, was paid by *Price*; and that the defendants were ſtrangers to *Price*. Withers v. Withers, Amb. 151.

The queſtion was, whether, upon the death of *Price*, *Harris*, who was the next in nomination, was entitled, or whether the copyhold went to the repreſentative of *Price*.

Lord *Hardwicke* was of opinion, that reſulting truſts of copyholds, as well as of freeholds, are within the ſtatute of frauds and perjuries, and that the repreſentative Smith v. Baker, 1 Atk. 385.

of *Price* was entitled to the copyhold by operation of law.

2 Black. R. 694.

§ 67 The Court of King's Bench obſerved in a modern caſe, that, in the Weſt, it was uſual upon copyholds for lives, that the *ceſtuis que vie* take in the order they ſtand in the copy; but the perſon who puts in the lives, and pays the fine, has a power of diſpoſing of the eſtate.

Who may be Truſtees.

1 Veſ. R. 453. 467.

§ 68. When truſts were firſt introduced, it was held, that none but thoſe who were capable of being ſeiſed to a uſe, could be truſtees. But this is quite altered, and it is now ſettled, that the king or a corporation may be a truſtee.

1 Veſ. 468. Amb. R. 552.

§ 69. It has alſo been determined, that when once a truſt is ſufficiently created, it will faſten itſelf upon the eſtate; and, therefore, if a conveyance or deviſe, by which a truſt is created, becomes void by the incapacity or death of the grantee or deviſee, ſtill the Court of Chancery will decree the truſt to be carried into execution.

Bennet v. Davis, 2 P. Wms. 316.

§ 70. A perſon deviſed lands to his daughter, who was married to a tradeſman in *London*, for her ſeparate and peculiar uſe, excluſive of her huſband, to hold the ſame to her and her heirs. The huſband became a bankrupt, and it was decreed, that he ſhould be a truſtee for his wife and her heirs.

§ 71. An

§ 71. An eſtate was deviſed to a corporation (which was incapable of taking in conſequence of the ſtatute of mortmain) upon certain truſts. It was decreed, that although the deviſe was void in law, yet that the truſt was ſufficiently created to faſten itſelf upon any eſtate the law might raiſe; and, therefore, that the heir at law was a truſtee to the uſe of the will.

Sonley v. Clockmakers, 1 Bro. Cha. Rep. 81.

§ 72. There formerly prevailed a diſtinction between truſts executed, and executory; but it is laid down by Lord *Hardwicke*, that all truſts are executory; and his Lordſhip is reported to have expreſſed himſelf, in this inſtance, in the following manner:—"All truſts are, "in the notion of law, executory, and to be executed "in this court by *ſubpœna*, as the old books ſpeak. "At common law every uſe was a truſt. Then came "the ſtatute 27 *Hen.* 8., and executed the legal eſtate "to the uſe, and conjoined them together. The ſtatute "mentions truſts as well as uſes; and a truſt executed "is, in ſtrictneſs, now a legal eſtate; and, therefore, "in order to bring it into the juriſdiction of the Chan- "cery, it muſt be executory, that is, the legal eſtate "muſt want to be executed to the truſt, and a con- "veyance to be decreed; therefore one eſſential part "of the truſt is, that the truſtee is to convey the eſtate "at ſome time or other; ſometimes it is to be done "ſooner, ſometimes later; and this whether the "teſtator has directed it or not: and ſo much every "teſtator is preſumed to know. One may therefore "reaſonably doubt how it can make any ſubſtantial "difference whether the teſtator has in words directed "a con-

All Truſts are executory.

Cunn. Dict. Art. Will. Bagſhaw v. Spencer.

" a conveyance or not, ſince the law, that is, the " courſe of this court, takes notice that the teſtator " could not intend his eſtate ſhould always remain in " the truſtees, but that one principal confidence re- " poſed in them was to convey."

TITLE XII.

TRUST.

CHAP. II.

Of the Rules by which Truſt Eſtates of Freehold are governed.

§ 1. *A Truſt is equivalent to the legal Ownerſhip.*
2. *Conſtructive in the Perſon ſtill neceſſary.*
3. *But not Privity of Eſtate.*
4. *Ceſtuique Truſt deemed the real Owner.*
5. *Truſts are alienable, deviſable, and deſcendible.*
6. *Truſts are intailable.*
7. *May be limited for Life.*
8. *Subject to Curteſy.*
10. *Exception—Truſt for the ſeparate Uſe of the Wife.*
12. *But not to Dower.*
21. *Subject to Forfeiture for Treaſon.*
24. *But not for Felony.*
26. *Not ſubject to Eſcheat.*
27. *Truſts are Aſſets.*
31. *Merge in the legal Eſtate.*
32. *Where an outſtanding legal Eſtate is a Bar in Ejectment.*

Section 1.

A Truſt is equivalent to to the legal Ownerſhip.

WE have ſeen, that truſt eſtates owe their origin to the ſtrict conſtruction given by the courts of law to the ſtatute of uſes; in conſequence of which, the Court of Chancery was obliged to interpoſe its authority. But in the exerciſe of this juriſdiction, they have avoided the inconveniencies with which uſes were attended; for, although the Court of Chancery firſt laid it down as a principle, that a truſt, being in fact an uſe not executed by the ſtatute, ought to be regulated by the rules which had been eſtabliſhed reſpecting

reſpecting uſes, before they were changed into legal eſtates; yet this idea was ſoon departed from, in many inſtances; and it was found much more convenient to
1 Veſ. 357. conſider a truſt eſtate as equivalent to the legal ownerſhip, and to regulate it in the ſame manner, as the
1 Black. R. legal eſtate. Hence Lord *Mansfield* has ſaid, "that "the *ceſtuique* truſt is actually and abſolutely ſeiſed of "the freehold in the conſideration of a court of "equity: that the truſt is the land in that court; and "that the declaration of truſt is the diſpoſition of the "land."

Confidence in the Perſon ſtill neceſſary.

§ 2. Although this principle has been adopted in moſt inſtances, yet a truſt eſtate ſtill retains ſome peculiarities which ſhew its origin. Thus, it is a rule, that confidence in the perſon is as neceſſary to the exiſtence
Fearne Cont. Rem. 479. Infra, ch. 4 of a truſt, as it was to that of a uſe. So that, even at this day, if a truſtee ſells the land for a valuable conſideration, to a perſon who has no notice of the truſt, the purchaſer will not be compelled in Chancery to execute the truſt.

But not Privity of Eſtate.

§ 3. As for the privity of eſtate, it was formerly held to be as neceſſary as confidence in the perſon;
Hard. R. 469. but this is now altered. And Lord *Mansfield* has ſaid,
1 Black. R. 155. "that part of the old law, which did not allow any "relief to be given for or againſt any eſtates in the *poſt*, "does not now bind by its authority, in the caſe of "truſts."

Vide Tit. 30. It ſeems, however, very doubtful, whether a lord by eſcheat is bound to execute a truſt.

§ 4. A *ceſtuique* truſt in poſſeſſion is conſidered, in every reſpect, as the real owner of the eſtate; and, by the ſtatute 7 *Will.* c. 25. ſ. 7., he is allowed to vote at elections for knights of the ſhire.

Ceſtuique Truſt deemed the real Owner.

§ 5. Any diſpoſition of a truſt eſtate by the *ceſtuique* truſt, is binding upon the truſtee, in a court of equity. It having been determined by the Court of Chancery in 33 *Cha.* 2., as a general rule, "that any legal conveyance or aſſurance by a *ceſtuique* truſt, ſhall have "the ſame effect and operation upon a truſt, as it "ſhould have had upon the eſtate in law, in caſe the "truſtees had executed their truſt. But all thoſe "technical words which the common law requires in "the limitation of particular eſtates, muſt be uſed in "the diſpoſition of truſts." Truſt eſtates are alſo deviſeable; and where they are not deviſed, they deſcend to the heirs of the perſon who was laſt entitled to them, in the ſame manner as legal eſtates.

Truſts are alienable, deviſable, and deſcendible.

2 Cha. Ca. 78.

§ 6. It was formerly held, that a truſt eſtate being merely the creature of a court of equity, was not within the ſtatute *De Donis Conditionalibus*; and, therefore, that where a truſt eſtate was limited to a perſon, and the heirs of his body, he might, after iſſue, bar ſuch iſſue by a feoffment, bargain and ſale, or will. But this doctrine is now altered; and it is fully ſettled, that a truſt eſtate may be intailed in the ſame manner as a legal one: and that ſuch intail can only be barred by a fine or recovery; which will have the ſame effect upon a truſt eſtate as upon a legal one.

Truſts are intailable.

1 Ab. Eq. 256.

Bowater v. Elly, 2 Vern. 344.

Kirkman v. Smith, Amb. R. 518, 2 P. Wms. 133.

§ 7. A truſt

May be limited for Life.

2 P. Wms. 147. 3 Atk. 729.

§ 7. A truſt eſtate may alſo be limited to a perſon for life; and, in ſuch a caſe, no fine or other aſſurance by the *ceſtuique* truſt for life will operate as a forfeiture of his eſtate.

Subject to Curteſy.

§ 8. Although no perſon could be tenant by the curteſy of a uſe, before the ſtatute 27 *Hen.* 8., becauſe the wife could have no ſeiſin of a uſe, yet it has been determined by the Court of Chancery, that a huſband may now be tenant by the curteſy of a truſt eſtate of freehold.

Watts v. Ball, 1 P. Wms. 108.

§ 9. A perſon having two daughters, deviſed his lands to truſtees and their heirs, in truſt to pay his debts, and to convey the ſurplus to his daughters equally. The eldeſt daughter brought her bill for a partition; and the only queſtion was, whether the huſband of the younger daughter ſhould have an eſtate for life conveyed to him, as tenant by the curteſy. The huſband, in his anſwer, had ſworn that he married the younger daughter upon a preſumption that ſhe was ſeiſed in fee of a legal eſtate in the moiety; that at the time of the marriage, ſhe was in the receipt of the profits of ſuch moiety. And it was admitted, that this truſt was not diſcovered until after the death of the younger daughter, and until it was agreed that a partition ſhould be made.

Lord Chancellor *Cooper* declared, that truſt eſtates ought to be governed by the ſame rules, and were within the ſame reaſon as legal eſtates. And as the huſband ſhould have been tenant by the curteſy, had

it

it been a legal eſtate, ſo ſhould he be of the truſt eſtate; and if there were not the ſame rules of property in all courts, all things would be, as it were, at ſea, and under the greateſt uncertainty.

His Lordſhip added, that this being a caſe of ſome difficulty, he could have wiſhed that it had not come before him as a cauſe by conſent; but his opinion was, that the huſband ought to be tenant by the curteſy, and the rather, becauſe it appeared, that he, upon his marriage, did conceive and preſume his wife to be ſeiſed of a legal eſtate in the moiety, and had reaſon to think ſo, ſhe being in poſſeſſion thereof. Wherefore it was decreed, that an eſtate for life, in a moiety, in ſeveralty, ſhould be conveyed by the truſtees to the huſband, with remainder in fee to his ſon.

§ 10. But where an eſtate is veſted in truſtees, for the ſole and ſeparate uſe of a married woman, her huſband will not be entitled to curteſy; for, in that caſe, it is the evident intention of the parties to exclude the huſband from any intereſt in the eſtate.

Exception—Truſt for the ſeparate Uſe of the Wife.

§ 11. Lands were deviſed by a perſon to truſtees and their heirs, in truſt to apply the rents and profits to the ſole and ſeparate uſe of his daughter during her life, and to permit and ſuffer her to diſpoſe of the lands to ſuch perſons as ſhe ſhould appoint. It was decreed that the huſband ſhould not be tenant by the curteſy of this eſtate, becauſe he had no ſeiſin of it, either at law or in equity.

Hearle v. Greenbank, 1 Veſ. 298. 3 Atk. 695.

But not to Dower.

§ 12. It might have been expected, that when the Court of Chancery deviated ſo far from the old law of uſes, as to allow a tenancy by the curteſy of a truſt eſtate, it would have extended the ſame indulgence to dower, which is an equitable as well as a legal right; yet it is now fully ſettled, that a widow is not dowable of a truſt eſtate, whether the huſband himſelf has parted with the legal eſtate, or a truſt eſtate has deſcended upon, or been limited to him.

Colt v. Colt, Rep. in Cha. 134.

§ 13. The firſt time this point appears to have been determined, was in 12 *Cha.* 2.; and although this doctrine has been followed by all modern Chancellors, yet they have always expreſſed their regret at being bound by ſuch a precedent. But ſo many caſes of this kind have ariſen, and the determinations have been ſo uniform againſt the claim of dower, out of a truſt eſtate, that it is not probable any alteration will be made in this reſpect.

Bottomley v. Fairfax, Prec. in Cha. 336.

§ 14. A huſband, before marriage, conveyed his eſtate to truſtees and their heirs, in ſuch manner, as to put the legal eſtate out of him; it was determined, that though the truſt eſtate was limited to him and his heirs, yet his wife ſhould not be endowed of it; and that the court had never gone ſo far, as to allow dower in ſuch a caſe.

Ambroſe v. Ambroſe, 1 P. Wms. 321.

§ 15. *A.* purchaſed an eſtate in the names of two truſtees, who acknowledged the truſt after his death; and upon a claim made by his wife for her dower, it

was

was decreed, that the wife was not dowable; and this decree was affirmed in the Houſe of Lords. Printed Caſes 1717.

§ 16. Sir *Joſeph Jekyll* has attempted to diſtinguiſh between the caſe of a truſt created by the huſband himſelf, and a truſt eſtate which has deſcended upon, or been limited to the huſband. In the firſt caſe, he admits it to be a ſettled point, from the authority of the preceding caſes, that the wife cannot have dower, becauſe it muſt be preſumed that the truſt was created for the ſole purpoſe of barring dower. Accordingly, it has been the common practice, for a purchaſer to take a conveyance of the legal eſtate in a truſtee's name to prevent dower. But, in the ſecond caſe, where the equitable eſtate deſcends, or comes to the huſband from another perſon, Sir *Joſeph* contends that it is different. This diſtinction, however, has been exploded by the following determination.

§ 17. *A.* deviſed a truſt eſtate to *B.* and his heirs, who was married, and, upon the death of *B.*, his wife claimed dower out of the truſt eſtate. Attor. Gen. v. Scott, Forreſt. 138.

Lord Chancellor *Talbot*—"The queſtion is very conſiderable, and very proper to be ſettled: dower is properly a legal demand, and here the eſtate is limited to truſtees and their heirs, to the uſe of them and their heirs, ſo that it is actually executed in the truſtees; and whatever comes after can be looked upon only as an equitable intereſt, for there cannot be an uſe upon an uſe. The queſtion, therefore, is, whether

" whether the wife of the deviſee is entitled to dower
" at law. No dower was of an uſe before the ſta-
" tute, it being entirely a legal demand; and then how
" ſhall ſhe be dowable of a truſt after the ſtatute, ſince
" no difference can be aſſigned between a truſt now
" and an uſe before the ſtatute? and courts of equity
" muſt follow the ſame rules now as to truſts, as pre-
" vailed before the ſtatute as to uſes. How the dif-
" ference now received between tenant by the curteſy,
" and tenant in dower, ever came to be eſtabliſhed,
" I cannot tell, but that it is eſtabliſhed, is certain;
" nor have I heard any caſe cited to the contrary, but
Prec. in Cha. 250. " that of *Fletcher* and *Robinſon*, which was determined
" upon another reaſon which does not affect the pre-
Ante, f. 72. " ſent caſe. That of *Bottomley* v. Lord *Fairfax*, is an
" exact authority that a woman ſhall not be endowed
" of a truſt, and the received practice of inſerting
" truſtees to bar dower, would otherwiſe be of no
" ſignification: for me, therefore, to do a thing merely
" upon the authority of an obſcure caſe, *viz. Fletcher*
" v. *Robinſon*, which does not ſeem to have been de-
" termined upon that point either, and that might
" perhaps ſhake the ſettlements of 500 families, is
" what I cannot anſwer to my conſcience."

It was decreed that the wife was not dowable.

Banks v. Sutton, 2 P. Wms. 706. § 18. It is laid down by Sir *Joſeph Jekyll*, that where a particular time is appointed for conveying the legal eſtate to the huſband, and he outlives that time, without obtaining ſuch conveyance, his widow ſhall, notwith-

notwithſtanding, be entitled to dower in equity. For where an act is to be done by a truſtee, that is looked on as done which ought to have been done. Infra, ch. 4.

But this doctrine is not ſupported by the decree in the caſe referred to, without the additional propoſition, that a widow was dowable of an equity of redemption in fee: it was a mortgage in fee, and not paid off during the coverture. If the truſtee, therefore, had conveyed, he would have conveyed an equity of redemption only, ſubject to a mortgage in fee, and the widow would not have been entitled to dower, unleſs ſhe was dowable out of ſuch an equity of redemption, which ſhe is not. This, therefore, though ſaid, will not ſupport the decree; and the propoſition is too important, and contradicted by too many analogies, to be hazarded upon this *dictum* alone. Vide Tit. 15. ch. 3.

§ 19. A widow is not dowable of a truſt eſtate in a copyhold or cuſtomary freehold.

§ 20. A bill was brought by a widow for a cuſtomary eſtate in lands at *Worceſter*. The huſband's father bought the lands, which were conveyed to him and *D.* and the heirs of the father. The father deviſed the lands to the huſband in tail, and *D.* ſurvived the huſband. The cuſtom was laid for the wife to have the whole lands as her freebench. Goodwin v. Windſmore, 2 Atk. 525.

Lord *Hardwicke*—"It is an eſtabliſhed doctrine "now, that a wife is not dowable of a truſt eſtate; "indeed, a diſtinction is taken by Sir *Joſeph Jekyll* in

" *Banks* and *Sutton*, in reſpect to a truſt where it de-
" ſcends or comes to the huſband from another, and
" is not created by himſelf: but I think there is no
" ground for ſuch a diſtinction, for it is going on ſup-
" poſitions which will hold on both ſides; and, at the
" latter end of the report, Sir *Joſeph Jekyll* himſelf
" ſeems to be very diffident of it, and reſted chiefly
" on another point in equity; ſo that it is no autho-
" rity in this caſe. But there is a late authority in
" direct contradiction to the diſtinction above taken
" in *Banks* and *Sutton*, the caſe of the Attorney Ge-
" neral v. *Scott*. The only caſe for the plaintiff, is
" that of *Otway* v. *Hudſon*, 2 *Vern.* 583.: there it was
" freebench, and is ſo called here; but it appears
" plain to be only cuſtomary dower: freebench is
" merely a widow's eſtate in ſuch lands as the huſ-
" band *dies* ſeiſed of, not that he is ſeiſed of during
" the coverture, as dower is. There were many cir-
" cumſtances in the caſe of *Otway* v. *Hudſon*; and it
" was decreed on the endeavour of the huſband to get
" the legal eſtate ſurrendered, and the refuſal of the
" truſtees, and grounded on his will: but, as to the
" general doctrine at the latter end, it is not warranted
" by the decree." The bill was diſmiſſed without coſts.

Vide Forder v Wade, 4 Bro. Rep. 521.

Subject to Forfeiture for Treaſon.

§ 21. At common law, the king was not entitled to any uſe upon an attainder for high treaſon of the *ceſtuique* uſe, as is mentioned in the preamble to the ſtatute of uſes: ſo that, after the paſſing of that ſtatute, truſts were, by an analogy drawn from uſes, alſo protected from forfeiture, upon an attainder of the *ceſtuique* truſt for high treaſon.

§ 22. By

§ 22. By the ſtatute 33 *Hen.* 8. c. 20., it is enacted, "that if any perſon ſhall be attainted or convicted of "high treaſon, the king ſhall have as much benefit and "advantage by ſuch attainder, as well of uſes, rights, "entries, and conditions, as of poſſeſſions, reverſions, "remainders, and all other things, as if it had been "done and declared by authority of parliament."

§ 23. Lord *Hale* has obſerved that, at the time when this ſtatute was made, there could be no uſe, but that which is now called a truſt; and although it was determined in *Abingdon*'s caſe, that a truſt eſtate of freehold was not forfeited by attainder of treaſon, yet that reſolution could not be reconciled to the ſtatute 33 *Hen.* 8., as the uſes there mentioned could be nothing but truſts; and, therefore, he was of opinion, that, upon an attainder for high treaſon of the *ceſtuique* truſt of an inheritance, the equity or truſt is forfeited by the 33 *Hen.* 8., though, poſſibly, the land itſelf is not forfeited. P. C. 248.

§ 24. But, whatever may be the caſe in an attainder for high treaſon, it has been determined, that an attainder for felony is not within the ſtatute 33 *Hen.* 8., and, therefore, that in ſuch a caſe, neither the land nor the truſt will become forfeited; for the king has his tenant as before, namely, the feoffee in truſt. But not for Felony.

§ 25. *Freeman Sands* being attainted of felony for the murder of his brother, and having a truſt eſtate in lands, of which Sir *George Sands* had the legal eſtate, and the lands being held of the king, the Attorney Attor. Gen. v. Sands, 3 Rep. in Cha. 19. 1 Hale P. C. 249.

General preferred an information againſt Sir *George Sands* in the Exchequer Chamber, to have a conveyance of the legal eſtate from Sir *G. Sands* to his majeſty, being the lord of whom the land was held.

But it was unanimouſly reſolved, that although *Freeman Sands* had the truſt of the land at the time of his attainder, yet, inaſmuch as Sir *G. Sands* continued ſeiſed of the lands, and ſo was tenant to the king, though ſubject to the truſt, yet the truſt was not forfeited to the crown; but that Sir *G. Sands* ſhould hold the lands for his own benefit, diſcharged from the truſt.

Not ſubject to Eſcheat.

§ 26. A truſt eſtate of inheritance does not eſcheat on the death of the *ceſtuique* truſt without heirs; but the truſtee may hold the land diſcharged from the truſt.

This point will be explained under Title 30. Eſcheat.

Truſts are Aſſets.

1 Inſt. 374 *b.* 3 Rep. in Cha. 30.

§ 27. Uſes were not originally liable to the debts of the *ceſtuique* uſe. But there are many precedents in the time of *Henry* 6., where the writ of *extendi facias* for levying the king's debts, was not only of the lands of the debtor, but of any other perſon who was ſeiſed to the uſe of the debtor. For it was determined, that when the king's debtor had the profitable part of the eſtate, the king ſhould not loſe his debt by any fiction of law.

§ 28. By

§ 28. By the ſtatute of frauds, 29 *Cha.* 2. c. 3. ſ. 10., it is enacted, that ſheriffs ſhall deliver execution of all lands, *&c.* whereof any other perſon or perſons are ſeiſed in truſt for the perſon againſt whom execution is ſued, which ſhall be held and enjoyed freed from all incumbrances of the perſons ſo ſeiſed, in truſt for the perſon againſt whom ſuch execution ſhall be ſued. And where any *ceſtuique* truſt ſhall die, leaving a truſt in fee-ſimple to deſcend to his heir, ſuch truſt ſhall be deemed and taken to be aſſets by deſcent.

§ 29. It was held in *Trin.* 1. *Geo.* 1., that if a truſtee has conveyed the lands to the *ceſtuique* truſt, before execution ſued, though he was ſeiſed in truſt for the debtor at the time of the judgment, the lands cannot be taken in execution. Hunt v. Coles, Com. R. 226. Saund. Rep. v. 2. p. 11. note.

§ 30. Where a truſt eſtate deſcends on the heir at law, though it may be neceſſary to come into equity to reduce it into poſſeſſion, yet it will be conſidered as legal, and not equitable aſſets, a truſt eſtate being made aſſets by the ſtatute.

§ 31. Truſt eſtates are, in all caſes, ſubject to merge in the legal eſtate, whenever both eſtates come to the ſame perſon; for a man cannot be a truſtee for himſelf. Merge in the the legal Eſtate. Doug. R. 776. 1 Bro. R. 368.

§ 32. It is a rule in law, that a plaintiff muſt recover in ejectment, upon the ſtrength of his own title, and cannot, of courſe, found his claim on the weakneſs of the defendant's title; for poſſeſſion gives the Where an outſtanding legal Eſtate is a Bar in Ejectment.

defendant a right againſt every man who cannot ſhew a good title. The party, therefore, who would change the poſſeſſion, muſt firſt eſtabliſh a legal title in himſelf; and therefore, where it can be ſhewn by the defendant, that the legal eſtate is not in the plaintiff, he cannot recover in this action.

3 Burr. R. 1901. Cowp. R. 46.

Doug. 721. 727.

§ 33. An outſtanding legal eſtate ſhall not, however, be ſet up as a bar in ejectment to the *ceſtuique* truſt, where ſuch *ceſtuique* truſt is entitled to the whole benefit of the legal eſtate. But Lord *Mansfield* has obſerved, that "the rule only is, that the truſt eſtate "ſhall not be ſet up in an ejectment to defeat the *ceſtui-* "*que* truſt in a clear caſe. In ſuch a caſe, where the "truſt is perfectly clear and manifeſt, the rule ſtands "upon ſtrong and beneficial principles, becauſe, in "ejectment, the queſtion is, who is entitled to the "poſſeſſion. But if the truſt is doubtful, a court of "law will not decide upon it in an ejectment; it muſt "be put into another way of inquiry."

Vide Infra, ch. 3.

TITLE

TITLE XII.

TRUST.

CHAP. III.

Of the Rules by which Truſt Terms are governed

§ 2. *Terms in Groſs.*
3. *They are not Aſſets.*
5. *Terms attendant on the Inheritance.*
7. *How a Term becomes attendant.*
15. *Where a Term is in Groſs.*
18. *A Term attendant may become a Term in Groſs.*
19. *Rules reſpecting Terms attendant.*
20. *A Term attendant is Aſſets.*
21. *Only paſſes by a Will duly atteſted.*
22. *Proteſts a Purchaſer from Dower.*
26. *But does not proteſt the Heir.*
28. *Nor the Aſſignees of a Bankrupt.*
29. *A Term only proteſts a Purchaſer where it is aſſigned to a Truſtee for him.*
31. *Curteſy not barred by a Term.*
32. *Where an outſtanding Term is a Bar in Ejectment.*

Section 1.

THE principles upon which terms for years are determined not to be affected by the ſtatute of uſes, have been already explained. It will now, therefore, only be neceſſary, to ſtate the rules by which they are governed.

§ 2. Terms for years are either veſted in truſtees for the uſe of particular perſons, or for particular purpoſes, or elſe upon truſt to attend the inheritance. In the firſt caſe, they are called *Terms in Groſs*; and the perſons entitled to the beneficial intereſt, have a right, in equity, to call on the truſtees, or perſons who have the legal

Terms in Groſs.

legal intereſt in the term, for the rents and profits of the lands, and alſo, for an abſolute legal aſſignment of the term.

They are not Aſſets.

King v. Ballet, 2 Vern. 248.

§ 3. It has been held, that if a man be *ceſtuique* truſt of a term, it is not aſſets within the ſtatute of frauds; for that ſtatute only extends to a truſt of lands held in fee-ſimple.

§ 4. Terms of this kind are, in general, governed by the ſame rules as legal ones; except that truſt terms in groſs are capable of being limited in a manner not allowed in the limitation of legal terms; of which, an account will be given hereafter.

Terms attendant on the Inheritance.

Vide Collect. Jur. v. 2. 297.

§ 5. With reſpect to terms which are attendant on the inheritance, they owe their exiſtence to the following circumſtances:—When terms for years became fully eſtabliſhed, and the intereſt of the termor was ſecured againſt the effect of fictitious recoveries, long terms became common; in all caſes of this kind, although the purpoſes for which the term was raiſed were fully ſatisfied, yet it did not determine; ſo that the legal intereſt continued in the truſtee: but as the owner of the inheritance was entitled to all the benefit and advantage of it, the term became, in fact, conſolidated with the inheritance, and is uſually called *a term attendant on the inheritance.*

Willoughby v. Willoughby, 1 Term Rep. 763.

§ 6. Thus, Lord *Hardwicke* ſays, "The attendance of terms for years upon the inheritance, is the creature of a court of equity, invented, partly, to protect

" protect real property, and, partly, to keep it in the " right channel. In order to it, this court framed the " diſtinction between ſuch attendant term and terms " in groſs, notwithſtanding that, in conſideration of " the common law, they are both the ſame, and " equally kept out of the owner of the fee, ſo long as " they ſubſiſt. But as equity always conſiders who " has the right in conſcience to the land, and, on that " ground, makes one man a truſtee for another—and " as the common law allows the poſſeſſion of the te- " nant for years to be the poſſeſſion of the owner of " the freehold, this court ſaid, that where the tenant " for years is but a truſtee for the owner of the inhe- " ritance, he ſhall not keep out his *ceſtuique* truſt, nor, " *pari ratione*, obſtruct him in doing any acts of owner- " ſhip, or in making any aſſurances of his eſtate; and " therefore in equity, ſuch a term for years ſhall yield, " ply, and be moulded according to the uſes, eſtates, " or charges, which the owner of the inheritance de- " clares or carves out of the fee. Proceeding upon " theſe principles, wherever a term for years has been " veſted in a ſtranger, in truſt for the owner of the " inheritance, whether by truſt expreſsly declared, or " by conſtruction or judgment of this court, which " is called *a truſt by operation of law*, this court has " ſaid, that the truſt or beneficial intereſt of ſuch a " term ſhall follow, or be affected by all ſuch convey- " ances, aſſurances, or charges, as the owner creates " of the inheritance: though the law ſays, that the " term and the fee being in different perſons, they " are ſeparate and diſtinct eſtates, and the one not " merged in the other; yet the beneficial and profit-

" able

" able intereſt of both, being in the ſame perſon,
" equity will unite them for the ſake of keeping pro-
" perty entire; therefore, if the owner of the inheri-
" tance levies a fine *ſur cognizance de droit*, or ſuffers
" a recovery to uſes, the truſt of the term muſt fol-
" low, and be governed by theſe uſes, although a
" term for years is not the ſubject of a fine *ſur cogni-*
" *zance de droit*, much leſs of a common recovery.
" Nor would equity allow the truſt of a term in groſs
" to be ſettled with ſuch limitations. This doctrine
" is always allowed to have its full effect as between
" the repreſentatives, *i. e.* the heir, either in fee-ſimple
" or fee-tail, of the owner of the inheritance, and the
" executor, and all perſons claiming as volunteers
" under him; although certain diſtinctions have been
" admitted as to the creditors, which are not material
" to the preſent caſe. And, in general, the rule has
" been the ſame, whether the truſt of the term be
" created by expreſs declaration, or ariſes by con-
" ſtruction and judgment of this court.

Id. " But although, in all caſes, this court conſiders
" the truſt of the term as annexed to the inheritance,
" yet the legal eſtate of the term is always ſeparate
" from it, and muſt be ſo, otherwiſe it would be merged:
" and this gives the court an opportunity of making
" uſe of ſuch terms as a guard and protection to an
" equitable owner of the inheritance againſt meſne
" conveyances, which would carry the fee at common
" law; or to a perſon who is both legal and equitable
" owner of the inheritance, againſt ſuch meſne in-
" cumbrances, as he ought not to be affected with in
" conſcience.

" conſcience. And here the court often diſannexes " the truſt of the term from the ſtrict legal fee, but " ſtill in ſupport of right."

§ 7. A term may become attendant on the inheritance, either by an expreſs declaration of truſt, or by implication of law. How a Term becomes attendant.

Thus, where a ſatisfied term is aſſigned to a truſtee, upon an expreſs truſt to attend the inheritance, the owner of ſuch inheritance acquires a right to the term by the declaration of the parties. But there are many caſes where no ſuch declaration is made, and then it becomes a queſtion in equity, whether it is a term in groſs, or a term attendant on the inheritance.

§ 8. In conſequence of a maxim in equity, " that " ſhould have the ſatisfaction which has ſuſtained the " loſs," it has been often determined, that where a term is carved out of the inheritance for any particular purpoſe, when that purpoſe is ſatisfied, the term becomes attendant on the inheritance. Max. in Eq. 21.

§ 9. A woman, before marriage, raiſed a term for 1000 years, upon truſt that her intended huſband ſhould receive the profits during their joint lives; and if they ſhould have any children, in truſt for ſuch children during the reſidue of the term. Beſt v. Stamford, Prec. in Cha. 252.

The huſband died without children; the wife ſurvived, and married another huſband, who ſurvived, and took out adminiſtration to his wife.

The

The queſtion was, whether the term ſhould go to the huſband or attend the inheritance.

Lord Keeper.—"This is only an unſkilful declaration, "and not the intent of the party; and the particular "purpoſe being ſerved, it muſt attend the inheritance; "for ſo I think it was at her ſecond marriage, and "that could not be altered by her death, for *equitas* "*ſequitur legem*; and cited *Polhill* v. *Polhill*, and if the "term and inheritance had been in the ſame hands it "would have merged; ſo here it ſhall be attendant "in equity."

§ 10. Where a perſon purchaſes the inheritance of lands, and obtains an aſſignment of an outſtanding term to a truſtee for himſelf; ſuch term will be conſidered as attendant on the inheritance.

North v. Langton, 3 Cha. Ca. 156.
Tiffin v. Tiffin, 1 Vern. 1.
Dowſe v. Derival, 1 Vern. 104.

§ 11. A woman, who had lent a ſum of money upon a mortgage, purchaſed the inheritance, and got the term aſſigned to a truſtee for her. On her dying inteſtate, this term was decreed to attend the inheritance, for the benefit of the heir, and not to go to the adminiſtrator. If ſhe had firſt purchaſed the inheritance, and afterwards the term, it would have been the ſame thing.

Huntingdon v. Huntingdon, 2 Bro. Ca. in Parl. 1.

§ 12. Lord and Lady *Huntingdon* ſettled certain lands, which were the eſtate of Lady *Huntingdon*, to the uſe of Lady *H.* for life, remainder to her ſon in tail, *&c.* ſubject to a power reſerved to Lord and Lady *H.* to revoke and limit new uſes. Lord *Huntingdon* pre-

vailed on his lady to join him in demiſing the premiſes for 1000 years to a mortgagee for ſecuring 4500 *l.*, and Lord *H.* covenanted to pay off the mortgage money. Lord *H.* paid off the mortgage, took an aſſignment of the term in truſt for himſelf, and deviſed it for the benefit of his younger children. Upon the death of Lord *H.* his eldeſt ſon filed a bill againſt the perſonal repreſentatives of his father and the truſtees of the term, praying that it might be aſſigned to attend the inheritance free from incumbrances. Lord Keeper *Wright* decreed, that the plaintiff muſt redeem the mortgage. But on appeal to the Houſe of Lords, this decree was reverſed, and the term was directed to be aſſigned to the appellant; becauſe when Lord *H.* paid off the mortgage, the purpoſe for which the term was created being ſatisfied, it became attendant upon the inheritance.

§ 13. *Edward Whitchurch* took a mortgage of certain lands from one *Biſs*, for 500 years. He afterwards took another mortgage of the ſame lands for 1000 years, in the name of another perſon, but in truſt for himſelf. *Edward Whitchurch* ſometime after purchaſed the inheritance of the premiſes in his own name, and deviſed them to a nephew.

Witchurch v. Witchurch, 2 P. Wms. 236.

The will not being executed according to the ſtatute, did not paſs the real eſtate. The heir at law of the teſtator brought a bill to compel the executor to aſſign over the term. It was decreed by the Maſter of the Rolls, that as this was a term which would have attended the inheritance, and in equity have gone to the heir,

heir, and not to the executor, in which reſpect it was to be conſidered as a part of the inheritance, ſo the will ſhould not carry it. Upon an appeal to the Lords Commiſſioners *Raymond* and *Gilbert*, the decree was affirmed.

9 Mod. 127.

Goodright v. Shales, 2 Wilſ. Rep. 329.

§ 14. *John Hoole* took an aſſignment of a term for years, which was in mortgage to a truſtee for himſelf, ſubject to an equity of Redemption. *John Hoole* afterwards purchaſed the fee-ſimple of the premiſes in his own name, and deviſed all his real eſtates to his grand-daughter, who was his heir at law.

Lord Chief Juſtice—"When *John Hoole* purchaſed "the fee, he became both the hand to receive, and "the hand to pay of the mortgage money: it wrought "an extinguiſhment of the debt due on the mortgage. "When *Hoole* purchaſed the fee, the mortgage term "was gone, though it did not extinguiſh the term in "point of law, (becauſe that was in *Shepherd*); yet it "became attendant on the inheritance, and muſt fol-"low it in point of law, as much as if it had been "made to do ſo, by the act of the party, *John Hoole* "himſelf."

When a Term is in Groſs.

§ 15. But where a perſon indicates in any manner an intention of ſeparating a term for years from the inheritance, it will then be conſidered as a term in groſs.

Hayter v. Rodd, 1 P. Wms. 362.

§ 16. A perſon, being ſeiſed in fee, deviſed his eſtate to a truſtee for 99 years, in truſt for himſelf and his

his wife for their lives and the life of the ſurvivor, and afterwards in truſt for the heirs of their bodies; and in default of ſuch iſſue, to the heirs of the body of the huſband, remainder to the heirs of the ſurvivor. They had iſſue a ſon. The huſband died; after which the ſon died in the life-time of his mother, who took out adminiſtration to her huſband and ſon, and aſſigned the term.

After the death of the wife, it was contended by the heir of *A.* that all the truſts of this term either became void by accident, or were ſo in their creation; ſo that the term had no ſubſiſtence for the benefit of the perſonal repreſentatives of any of the parties, but ſhould be conſidered as attendant on the inheritance.

It was, however, decreed, that this term ſhould not be attendant on the inheritance; for that the party who raiſed it, and had power to ſever it from the inheritance, ſhewed his intention to do ſo, by limiting the truſt to the ſurvivor of him and his wife, and the heirs of the ſurvivor; which, though it was a void limitation, yet ſufficed to ſhew his intent to ſever ſuch term from the reverſion.

§ 17. Sir *A. Chadwick* purchaſed an eſtate in fee-ſimple from Mrs. *Rudger*; and there being an outſtanding term in a truſtee, a derivative leaſe of it was granted to a truſtee for Sir *A. Chadwick*, with a nominal reverſion of eleven days to the truſtee of Mrs. *Rudger*.

Scott v. Fenhouillet, 1 Bro. Rep. 69.

The queſtion was, whether this term was a term in groſs or to attend the inheritance.

Lord Chancellor *Thurlow*.—Every term ſtanding out, is at law a term in groſs. If it be different in equity, it muſt be by affecting the perſon holding the term with a truſt to attend the inheritance. This may be by two ways: by expreſs declaration, and then whether the term would or would not merge, and whether the reverſion be real or only nominal, it muſt be attendant on the inheritance. Here it is not upon expreſs declaration: then it muſt ariſe from implication of law, founded on the ſtatute of frauds, which forbids any truſt except by writing or implication of law. It is ſaid to be extremely plain, that Sir *Andrew Chadwick* meant to conſolidate the intereſts.—This is begging the queſtion. It is true he meant to take the largeſt intereſt he could, but it is by no means apparent that he meant to conſolidate the intereſts. I lay no ſtreſs on the days of the reverſion, for it was meant only as a nominal reverſion; during that time the rent would be to the original leſſee: but they did not mean to reſerve a ſubſtantial intereſt. It would be neceſſary there ſhould be an expreſs truſt to make this attendant on the inheritance. The tranſaction does not ſupply a neceſſary conſtruction of law: it is a very nice and very new point, whether the intent to purchaſe the whole intereſt is ſufficient to make the term attendant upon the inheritance. The impoſſibility he was under of purchaſing the whole, rendered an expreſs declaration neceſſary to make it attend the inheritance (*a*).

(*a*) There is a very able opinion of Mr. *Fearne's* on this caſe, publiſhed in a work intitled *Collectanea Juridica*. Vol. 2. No. 6.

§ 18. The

§ 18. In the caſe of *Willoughby* v. *Willoughby*, Lord *Hardwicke* ſays, "A term attendant on the inheritance "may be diſannexed and turned into a term in groſs "by the abſolute owner of the inheritance. And ſo "it is admitted by Mr. Serjeant *Maynard* in the Duke "of *Norfolk*'s caſe 46.; or it may be made to become "a term in groſs upon a contingency, according to the "reſolution of that caſe."

A Term attendant may become a Term in Groſs.

1 Term R. 770.

§ 19. Terms attendant on the inheritance are conſidered as abſolutely annexed to the inheritance, and conſtituting part of it; and are therefore not ſubject to thoſe rules by which terms in groſs are governed. They follow the deſcent to the heir, and all alienations made by him; they are capable of being intailed, and limited over after a general failure of iſſue, provided the inheritance on which they are attendant is limited in the ſame manner. And where, in caſes of this kind, a common recovery is ſuffered of the inheritance, it will bar the intails and remainders over of the term as well as thoſe of the freehold; for the term can no longer attend an eſtate tail which is deſtroyed, nor can the truſtee, who is but an inſtrument to protect others, have the term to his own uſe; ſo that it muſt thenceforth attend on the inheritance in fee.

Rules reſpecting Terms attendant.

Vide Collect. Jur. v. 1. 297.

1 Vent. 194.

1 Term R. 766.

§ 20. It was formerly much doubted, whether a term of years attendant on the inheritance was perſonal aſſets for payment of debts; but it is now fully ſettled, that a term attendant on the inheritance in fee-ſimple is only real aſſets in the hands of the heir. For the ſtatute of frauds having made a truſt eſtate in fee, aſſets

A Term attendant is real Aſſets.

Hard. 489. 1 Term. Rep. 766.

in the hands of the heir, the term which is annexed to the inheritance, and which is ſubject to all the charges that affect the inheritance, muſt be ſo alſo.

Only paſſes by a Will duly attested. Collect. Jur. v. 2. 297.

§ 21. A term attendant on the inheritance is ſo fully conſidered as part of the inheritance, and not as a chattel real, that it does not paſs by a will of chattels, but only by a will executed in ſuch a manner as is neceſſary to paſs real eſtates.

Protects a Purchaſer from Dower.

§ 22. A term attendant on the inheritance will protect a purchaſer for a valuable conſideration againſt the claim of dower, although ſuch purchaſer had notice of the marriage at the time of his purchaſe.

Lady Radnor v. Vandebendy. Show. Ca. in. Parl. 69.

§ 23. Lady *Radnor*'s huſband was ſeiſed in tail of the lands in queſtion, but there was a term of 99 years prior to his eſtate, which was created for performance of ſeveral truſts in the Earl of *Warwick*'s will, (which were all performed), and after, in truſt to attend the inheritance. Lord *Radnor* levied a fine and ſuffered a recovery, and ſold the eſtate to *Vandebendy*; the term was aſſigned to the purchaſer. Lady *Radnor* not joining, ſhe, after her huſband's death, recovered dower, with a *ceſſat executio* during the term; and brought her bill to have this term removed, and to have the benefit of her judgement and recovery at law. But the court held, that this being againſt a purchaſer, equity ought not to give her any relief, and therefore diſmiſſed the bill. From this decree, there was an appeal to the Houſe of Lords, where it was argued for the appellant, that equity did entitle her to the thirds

of

of this term: that a tenant by the curteſy is entitled to it, and, by the ſame reaſon, a tenant in dower: that the term created by the ſettlement was to attend all the eſtates limited by that ſettlement, and in truſt for ſuch perſons as ſhould claim under it, which the appellant does as well as the reſpondent: that the purchaſer had notice of the incumbrance of dower, the vendor being married when he ſold the eſtate: that ſhe claims under her huſband, who had the benefit of the whole truſt. On the other ſide, it was ſaid, that dower is an intereſt or right at the common law only: that no title can be maintained to dower, but where the common law gives it; and if a term were in being, no woman was ever let in until after the determination of that term: that this was the firſt pretence ſet up for dower in equity; the right is only to the thirds of the rent reſerved on any term: that it had always been the opinion of conveyancers, that a term or ſtatute prevents dower; and that the conſequence of an alteration would be much more dangerous than the continuance of the old rules. The decree was affirmed.

§ 24. The doctrine eſtabliſhed in this caſe, is contrary to the general principles of equity, which has never extended its protection, in any other inſtance, to purchaſers, with notice of incumbrances, at the time of their purchaſe. The true and only reaſon on which it was founded, was, the ſilent uniform courſe of practice, uninterrupted, but, at the ſame time, unſupported by legal deciſions: an opinion having been generally adopted by the profeſſors of the law, that a

ſatisfied term would protect a purchaſer againſt the claim of dower; and many eſtates having been purchaſed under this opinion. It is now, however, fully recognized and confirmed by a decree of Lord *Hardwicke*, of whoſe judgement on the caſe, the following account is taken from Mr. *Butler*'s notes on the firſt *Inſtitute*.

Swannock v. Lifford, 1 Inſt. 208 *a*. n. 1. Hill v. Adams, 2 Atk. 208. S. C.

Lord Chancellor.—The plaintiff's huſband being ſeiſed of a freehold eſtate, ſubject to a term of 1000 years, ſtanding out in a mortgagee by virtue of a mortgage made by his father, conveys the inheritance to defendant for a valuable conſideration, and, at the time of this conveyance, defendant takes an aſſignment of the term in mortgage, in the name of truſtees, to wait and attend upon ſuch inheritance: and now the plaintiff brings her bill againſt defendant the purchaſer, for dower, praying to be admitted to redeem this mortgage term, and to have it out of the way; and, upon payment of her proportion of the mortgage money, to be let into her dower immediately, that ſhe might not wait till the determination of the term. And the queſtion is, whether the court ought to decree this under the preſent circumſtances of the caſe. I cannot ſay but that the decree already made at the Rolls for plaintiff the widow, is abſolutely conſiſtent with the mere reaſon of the thing, if it was not to be conſidered originally, and ſettled; but as this muſt depend not only upon the precedents of the court, but the practice of conveying titles to eſtates, upon which the precedents themſelves were ſettled, I do not wonder that a decree of this kind ſhould be made by a judge who was not abſolutely

abſolutely converſant in ſuch precedents of the court, and the diſtinction taken therein. But upon conſideration of them, and the great authority relied upon of Lady *Radnor* and *Vandebendy*, I am of opinion that the decree ought to be reverſed; and if it ſhould not, would it not be going directly contrary to that great authority, and the reaſons upon which it is founded, and make ſuch uncertainty in this court, in regard to purchaſers, that the ſubject would not know what to rely upon. The wife here claims her dower, ſubject to a term originally ſtanding out in a mortgage; the conſequence of that is, that, in law, though ſhe might have brought her writ of dower, and recovered judgement, yet ſhe could not have had the benefit of it, till after the determination of the term; for the judgement would be with a *ceſſat executio* till that time: this was the wife's legal remedy, and, that being ſo, ſhe comes into this court upon the foundation of her general right of dower, to be delivered from that reſtriction which the law impoſes upon her, from having the benefit of it till ſuch determination of the term, and to be admitted to redeem this term, which is now not in the hands of the mortgagee, but of the purchaſer, as being aſſigned to attend upon the inheritance, and for the other purpoſes before mentioned; and though the aſſignment is not in the words, *to protect the inheritance from dower or meſne incumbrances*, yet it is always ſo underſtood, otherwiſe there would be no uſe in taking the term in the name of a truſtee. It is admitted by the defendant, in caſe things had ſtood as they were at the time of the marriage, viz. that the term had been in the mortgagee, and the inheritance in the huſ-

band as heir, or purchaſed from him by the purchaſer, without aſſignment of the term, as here, the wife, as entitled to dower, might then have come here to redeem the mortgage, to have the benefit of coming at her dower immediately, by paying off the mortgage money, or keeping down the intereſt, for the benefit of the heir or purchaſer; and even this was, (when originally ſettled), going a good way in favour of a dowreſs, though it was conſiſtent with the reaſon of the thing; for as ſhe was entitled to dower, and as a mortgagé is only a redeemable intereſt, it is fit the equity of redemption ſhould follow the nature of the intereſt in the eſtate; and ſhe to be endowed, and the heir at law to be entitled to the inheritance, ſubject to ſuch dower, was giving the wife a real benefit, ariſing from her dower, and not a mere nominal one, as it would be at law, where there is an outſtanding term: for, when the law ſays ſhe ſhall have judgement for dower, but with a *ceſſat executio* till the determination of the term, that is, in fact, to ſay, ſhe ſhall have no dower; and therefore this court, as againſt the heir, but not the purchaſer of the term and inheritance, gives her the benefit of her dower, by removing the term; and if all the caſes of tenancy in dower, and curteſy likewiſe, were now originally to be conſidered, it might as well be left upon the ſtrength of the law, for it is undoubtedly a mere legal title that the one has as well as the other; and there is no contract of the parties intervening; therefore, if a woman marries, and the huſband is in poſſeſſion of an eſtate, or if a man marries, and the woman is in poſſeſſion of an eſtate, each party knows that, at the time of the marriage, their eſtates

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are liable and ſubject, on the one ſide, to a tenancy by the curteſy, and, on the other, to dower, and to all meſne incumbrances and terms; and there is no harm to ſay that both ſhall take their chance. The commiſeration in reſpect to dower, has ariſen from the determination in favour of tenancy by the curteſy; and, indeed, the diſtinction made between dower and curteſy, is founded upon very ſlight reaſons; but, however, it has been ſo eſtabliſhed. The great point, in this caſe, depends upon the determination in the caſe of Lord *Radnor* and *Vandebendy* in *Show. P. C.*, and *Preced. in Chan.*: and that was thus. (I mention it from Lord *Somer*'s own notes).

It was ſent to the maſter in order to ſtate the caſe, who ſtated it, that *Charles* Earl of *Warwick*, upon the marriage of his ſon, ſettled his eſtate, as to part, in jointure to his lady, and part upon the ſon in tail, and part upon himſelf in tail, and, upon failure of iſſue male, then to truſtees for 99 years, to be diſpoſed of by the ſaid Earl either by deed or will; and for want of ſuch appointment, the term was declared to be for the next in remainder, and to be attendant upon the inheritance. And as to a third part of a moiety of the eſtate, it was limited to Lord *Bodmyn* in tail, the ſon died without iſſue, and then the Earl, according to his power of appointment, charges the eſtate with ſome annuities, of which, ſome were determined at the time of the purchaſe in queſtion, and ſome were continuing; and then the truſt term, which was merely ſuch, was to be attendant upon the inheritance. *Vandebendy* purchaſes of Lord *Bodmyn*, the plaintiff's huſband, that

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part of the eſtate limited to him, and took, not only a conveyance, but a recognizance in two ſtatutes, in very conſiderable ſums to indemnify the eſtate from incumbrances, and againſt the wife's dower, and for ſuffering a recovery, and took an aſſignment of the term. *Vandebendy* afterwards conveys to Sir *John Rotheram*, which occaſioned it to be called in *Preced. in Chan.* by that name. Lady *Radnor* brought a bill to have the benefit of dower againſt *Vandebendy*, (who purchaſed of Lord *Bodmyn* her huſband), and to ſet this term out of the way. And by the decree before made, Lord *Jefferys* inclined to give relief, and did ſet the term out of the way, and direct ſhe ſhould bring dower at law; but Lord *Somers* reverſed that decree, and, upon appeal to the Houſe of Lords, the reverſal was affirmed. There was great doubt in this court, and ſo in the Houſe of Lords, and there was a great inclination in the houſe to reverſe that decree of Lord *Somers*, but when the counſel came to the bar, the lords aſked, whether it was uſual for conveyancers to convey terms for years to attend the inheritance, to prevent dower, and the counſel with great candour ſaying it was, the Lords affirmed Lord *Somers'* decree. The point that weighed in the judgment was, that this was the caſe of a purchaſe for valuable conſideration; that in making conveyances, purchaſers relied upon that method of taking a conveyance of the inheritance to themſelves, and an aſſignment of the term ſtanding out to a truſtee, to attend it; that the outſtanding term was prior to the title of dower in the wife, and, therefore, purchaſers have relied upon that, as a bar to ſuch dower: ſo that this court and the Houſe of Lords

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were of opinion, that if they were not to permit that to be ſo, it would be to overturn the general rule which had been eſtabliſhed and practiſed by many titles to eſtates, and tend to make ſuch titles precarious for the future. And as to what was ſaid in the caſe of *Brown* and *Gibbs*, *Preced. Chan.* 99. *viz.* that though there was a purchaſer in caſe of Lord *Radnor* and *Vandebendy*, yet that the court did not go upon that reaſon, I do not know who reported that to be the ſaying of the court, but this I know, that that was the only reaſon for the determination there; and that is plain, for *Vandebendy* the purchaſer having purchaſed for a valuable conſideration, Lord *Somers* did rely upon that greatly, for he ſaid it has been always looked upon, that a term purchaſed in by ſuch a perſon to protect the inheritance againſt dower, *&c.* has been ſufficient for that purpoſe; and, therefore, it would not only be a new thing, to determine it ſhould not, but of very great conſequence, and greater than what appears at firſt view: beſides, what has been already mentioned, and eſpecially ſince practitioners have all along adviſed this method, whereby many perſons have been purchaſers in that way, and there cannot be a ſtronger argument againſt altering this method by any determination, than to ſay it was never done. But the argument by the counſel was of another nature; for they ſaid that judgment has been given for dower in all ages; and in the caſe of a term, as in the preſent caſe, ſhe might come into this court to have the benefit of her dower notwithſtanding ſuch term.

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Ever ſince this caſe, it has always been ſaid, that the court is bound by it; and, on the other hand, I have heard it often ſaid by the court, that they will go no farther; and, therefore, to have the benefit of a determination, every perſon's caſe muſt be exactly and ſtrictly the ſame with that. I am of the ſame opinion too, and will not go any further than that caſe does; ſo that then the queſtion comes to this, whether there is any diſtinction between this caſe and that.

It is ſaid that there, the purchaſer was allowed to protect himſelf by taking in the term attendant upon the inheritance, becauſe that was a ſatisfied term; which, in the conſideration of this court, was become part of the fee. That he purchaſed the whole eſtate of the huſband, and therefore an old term, ſuch as that was, has been allowed to be ſo aſſigned to protect the inheritance; but that, in this caſe, the huſband had nothing in the term, becauſe he was owner of the inheritance, ſubject to it, and to the equity of redemption of it; and for that, at the time of the purchaſe, the term was in mortgage, and ſtanding out, and the money advanced ſtill due upon it. That it was a ſecurity ſeparate from the huſband's inheritance, and the purchaſer took it from the mortgagee only, and not from the huſband. But I think that makes no difference here from that of *Vandebendy*: if there is any difference, it is againſt the plaintiff, and makes the caſe much ſtronger in favour of the preſent purchaſer. It is difficult to ſay, upon the ſtate of the caſe, that the term there was a ſatisfied term, at the time of the purchaſe; I rather think

think it was not, for Lord *Somers* ſtates it that the Earl of *Warwick*, who had the power of appointing the truſt term, did appoint it, by charging it with ſome annuities, which were to commence a year after; and that ſome of them were continuing, and ſome of them determined, and I think after the purchaſe made; and if that was ſo, this was not a ſatisfied term, but ſtill ſubſiſting, to pay thoſe annuities which were incumbrances continuing on the terms; ſo that *Vandebendy*, who took the aſſignment of the term, took it ſubject to the truſt ſo continuing on it, in like manner as the purchaſer here took the term, ſubject to the mortgage, and the money due thereon: therefore the diſtinction endeavoured to be made between the caſe there, being a ſatisfied term, and this, being a mortgage term, not ſatisfied, fails. But ſuppoſing the term had been ſatisfied, how would that make any difference? It is true that would then have been a truſt for the huſband and his heirs, and he would have it as part of his ownerſhip and dominion over the eſtate, and, conſequently, it would be ſubject to dower, as againſt the huſband; for if the huſband dies, and there is a ſatisfied term continuing, the wife would be entitled to come into this court againſt the heir, to ſet that term out of the way, in order to have the benefit of her dower; and that is expreſsly ſo ſaid in the caſe of *Banks* and *Sutton*, 2 *Wms.* 700., by the Maſter of the Rolls, and he cites a caſe to that purpoſe; and undoubtedly ſhe would without paying any thing; and if, in the preſent caſe, the huſband had made no conveyance to the purchaſer, and the mortgage had continued in the mortgagee, or his aſſignee, and the equity

of redemption had deſcended on the heir, ſhe would have been entitled likewiſe to dower againſt him, by redeeming the term and paying her proportion of the mortgage money, or by keeping down the intereſt. But if a term for years is in mortgage, and a perſon purchaſes the inheritance of the huſband, and takes an aſſignment of the term from the mortgagee, by paying off the money, not only to have the truſt of the term as a ſecurity, but to protect the inheritance ſo purchaſed, would it not be hard to take away the benefit of it from him? Shall it be ſaid, that he ſhall have a leſs inheritance by taking in a mortgage term in that manner, by actually paying off the mortgage money, than if he had taken an old ſatisfied term, for which he never paid any thing? Therefore if the term in Lady *Radnor*'s caſe had been a ſatisfied one, that would have been ſo far from diſtinguiſhing that caſe from this, in favour of the plaintiff, that it would have been rather ſtronger in favour of the purchaſer, for here he paid a conſideration for the outſtanding term, and there would have been nothing paid for ſuch ſatisfied term: but it is ſaid that this purchaſe of the mortgage was from the mortgagee, and not from the huſband; if that was ſo, I do not know that this would make any difference, becauſe the huſband here joined in the aſſignment of the mortgage. But what reſults from this caſe is, that it was part of the agreement of all the parties, (the huſband joining) that the term ſhould be purchaſed in by the purchaſer of the eſtate, to attend his inheritance; and that is the very truſt declared by the deed. It has been admitted here, that if the huſband had paid off the mortgage himſelf, after the coverture, and taken

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an aſſignment of the term in mortgage, in truſt for him and his heirs, to attend the inheritance, (in which caſe it would have then become a ſatisfied term), and after this a purchaſer had purchaſed from him, and paid him the whole money, and taken a conveyance of the inheritance from him, and an aſſignment of the term from the truſtees, that would have been very well, and within the caſe directly of Lady *Radnor*. What is the difference then in the reaſon of the thing, whether the huſband pays off the mortgage himſelf, and takes an aſſignment of the term, in truſt for himſelf and his heirs, and then ſells to a purchaſer the inheritance, who takes the term from the truſtees; or when the purchaſer comes and purchaſes the inheritance from the huſband, and pays off the mortgage, and takes an aſſignment of the term to himſelf; is the caſe the leſs ſtrong for that? It is rather ſtronger. It is admitted that if this had been an old ſatisfied term, ſtanding out attendant upon the inheritance, and a purchaſer had purchaſed from the huſband, and had taken in this term, that would have protected the inheritance.

That if a man, before marriage, conveys his eſtate privately, without the knowledge of his wife, to truſtees, in truſt for himſelf and his heirs in fee, that will prevent dower. So if a man purchaſes an eſtate after coverture, and takes a conveyance to truſtees in truſt for himſelf and his heirs, that will put an end to dower. So if he takes an eſtate in joint-tenancy, or a conveyance to himſelf for a long term of years; but it is objected that the act done here by the purchaſer, at the time of purchaſe, he having notice of the marriage,

will put the wife in a worſe condition than ſhe would have been in originally, if the purchaſer had not intervened; ſince, then, there would have been a redeemable mortgage, (the equity of redemption being in the huſband), and the huſband dying, ſhe would be entitled to redeem ſuch mortgage, and then to have had dower; and, therefore, by the purchaſer's knowing of the title of dower, by reaſon of the marriage, he would have put her into a worſe condition, which in equity he ought not to have done: and this ought not to alter her right. But this does not differ from the common caſe, for in this caſe ſuppoſe the huſband had, before the purchaſe, redeemed the mortgage, and taken an aſſignment of the mortgage term, in truſt for himſelf and his heirs, to attend the inheritance, and after that the purchaſer had purchaſed from him, and taken an aſſignment of ſuch attendant term, in truſt to him and his heirs, would not that have altered the wife's right to dower? though, without that intervention of the purchaſer, ſhe would be entitled to her dower, as againſt the heir. So, likewiſe, in the caſe of an old term attending upon the inheritance in truſt. But this purchaſe prevents the deſcent of the eſtate to the heir; and therefore it is not to be ſaid that the purchaſer has put the wife in a worſe condition by the intervention of his purchaſe: but becauſe conveyancers did rely upon the aſſignment of the term to truſtees, to protect the inheritance, as ſufficient for that purpoſe, it was determined, as has been mentioned; and I do not ſee how the preſent caſe can differ from that of an old term to attend the inheritance. But the preſent point is, that here the term was in the mortgagee, and the inheritance

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in the huſband; the term will ſtand in the way of dower at law, and the purchaſer comes in upon that foot, pays his money, and relies upon that term to protect his purchaſe; and therefore I think this is ſtrictly within the reaſon of the caſe of Lady *Radnor* and *Vandebendy* and all the other caſes grounded upon it.

Another diſtinction made is, that here is an expreſs covenant taken from the huſband, againſt the dower of his wife; for the covenant is that the purchaſer ſhould enjoy the eſtate free from incumbrances, &c. and from all dowers, &c. and particularly the dower of the plaintiff; and then there is a covenant for further aſſurance, and that this ſhews that the purchaſer relied upon this covenant as his ſecurity, to indemnify him againſt dower, and that it is plain, without queſtion, this is notice of the dower.

A man may reaſonably take a covenant againſt ſuch right of dower, and yet rely upon the ſecurity of the truſt term beſides, and may take ſuch covenant againſt any damages, in reſpect to any ſuits by the wife for dower. The purchaſer did not purchaſe here ſubject to the wife's dower, for he paid a price for the eſtate excluſive of it. If the eſtate in his hands had been ſubject to the dower, then the covenant againſt it of the huſband's would not have ſignified; but, however, be that as it will, it is ſimilar to that of *Vandebendy*, for there the purchaſer took two ſtatutes with defeazances, to indemnify the eſtate from incumbrances, and the wife's dower, and to ſuffer a recovery; and it was in-

ſiſted upon there, by the counſel, as is here, but Lord *Somers* ſaid, though a man does take ſuch ſecurity, which he does to prevent any damages that may ariſe, yet that does not preclude him from any favour he is entitled to.

Another conſideration, in this caſe, is length of time, for the purchaſe was made in 1711; the huſband died in 1719, and the plaintiff, the widow, never brought dower, or the preſent bill, till 1737: and it appears that defendant, the purchaſer, has ſince made great improvements upon the eſtate, and therefore it would be very hard, eſpecially after the ſeveral caſes determined in favour of purchaſers, even if there was a hair's-breadth of diſtinction between this caſe and that of Lady *Radnor* and *Vandebendy*, to ſuffer the plaintiff now to come here for dower.

It is ſaid, about 10 years ago, plaintiff did claim her dower of the preſent defendant, which amounted to notice to him of ſuch dower, (which he did not want), but, however, the making a claim, and then not proceeding directly upon it, ſhows that plaintiff was conuſant of her right, but would not proceed; and the purchaſer muſt think, by her delaying ſo to do, that ſhe would not, and that might be an inducement for him to make ſuch improvements as he has done.

Therefore, upon the whole, I think the decree ought to be reverſed, and the bill diſmiſſed: but I will not give coſts.

§ 25. This

§ 25. This doctrine has been fully recognized in a modern caſe by the late maſter of the rolls, (Sir *R. P. Arden*), who is reported to have ſaid:—"It is perfectly eſtabliſhed, that a purchaſer for a valuable conſideration from the owner of the equitable intereſt, may protect himſelf, though the owner could not, by the aſſignment of any outſtanding terms. He might therefore protect himſelf againſt any demand ſhe (the widow) might have of dower at law. The deciſion is a very ancient one, and was affirmed by the Houſe of Lords. Therefore, however queſtionable it might have been, it is now clear that a purchaſer, or a mortgagee, who is a purchaſer *pro tanto*, though he knows of the right of dower, may advance his money, and, taking in a term, may avail himſelf againſt any demand ſhe might have of dower at law." Wynn v. Williams, 5 Veſ. jun. 134.

§ 26. The doctrine, that an outſtanding term of years ſhall protect a purchaſer from the claim of dower, was carried ſtill farther; for it was determined, that a ſatisfied term ſhould even protect an heir at law from dower. But does not protect the Heir. Brown v. Gibbs, Prec. in Cha. 97. 2 P. Wms. 707.

This determination was, however, ſoon over-ruled, and it was reſolved, that an outſtanding term ſhould not protect an heir at law from dower.

§ 27. A term was raiſed in *Blackacre*, in truſt to indemnify Mr. *Buckley* againſt incumbrances which might affect *Whiteacre*, which he had purchaſed. The defendant *Williams* brought a writ of dower of *Blackacre* Wray v. Williams, Prec. in Cha. 151. Vide 2 P. W. S. C.

againſt the plaintiff, who was an infant, and his guardian had let her take judgment at law without ſetting up the term, or taking any notice of it; ſo this bill was brought by an infant heir to be relieved againſt that judgment. It was ſaid by Lord Keeper *Wright*, that this caſe was the ſame with Lady *Radnor*'s, and if ſhe could not be relieved as plaintiff, it muſt be for want of equity, and therefore the plaintiff muſt be relieved againſt her, when ſhe is defendant. Nor was there any difference, in reaſon, between a tenant by the curteſy, and a tenant in dower; but one had been adjudged one way, and the other another. And Lady *Radnor*'s caſe having been affirmed in the Houſe of Lords, the authority was ſo great that it could not be got over. And it had always been admitted, that an unſatisfied mortgage ſhall not ſtand in a dowreſs's way, but that ſhe ſhall redeem: but this is not a mortgage, but a term to indemnify a purchaſer; and it muſt continue ſo, and, ſubject to that, it muſt be in truſt for the heir.

At a rehearing of this caſe before Lord Keeper *Harcourt*, Lady *Williams* counſel cited the caſes of *Porter* and *Hammond*, *Snell* and *Clay*, *Pemberton* and *Jarvell*, and inſiſted, that Sir *B. Wray*, who was but a volunteer, ſhould not, in equity, be relieved againſt a dowreſs; and that the caſe was different from Lady *Radnor* and *Vandebendy*, in regard *Vandebendy* was a purchaſer. To which, it was anſwered, that if Lady *Williams* had been plaintiff in the original bill in equity, ſhe could not be relieved; foraſmuch as the 99 years term muſt have ſubſiſted as well for the benefit of the deviſee

deviſee as of the heir at law. That it was the ſame in reaſon with Lady *Radnor*'s caſe; and that the term for 99 years was prior to the marriage, and ſo the huſband only ſeiſed of the reverſion in fee during the coverture; that as to *Vandebendy*'s being a purchaſer, he he was ſo, *with full notice of dower*, and got in the term to protect him againſt the dowreſs; and therefore, *having notice*, he was to be conſidered only as a volunteer: that in dower, where the huſband was ſeiſed of the reverſion in fee, expectant upon a term for years, the plaintiff might indeed recover judgment; but the writ of ſeiſin was not to be awarded until the term ended.

Lord Keeper *Wright*'s decree was reverſed, and the truſt term removed in favour of Lady *Williams*.

Nor the Aſſignees of a Bankrupt.

9 Vin. Ab. 227.

§ 28. In a late caſe, it was a queſtion, whether the aſſignees of a bankrupt, by taking an aſſignment of a mortgage term prior to the title of dower, ſhould protect their eſtate from dower. It was inſiſted, that creditors and aſſignees of bankrupts ſtand only in the place of a bankrupt; and, ſince ſuch aſſignment to the bankrupt himſelf, or his heirs, would not protect the eſtate from the title of dower, in the hands of the heir, neither will it protect the eſtate in the hands of a bankrupt's creditors, or the aſſignees of the commiſſioners. And this differs the preſent caſe from the caſe of Lady *Radnor* v. *Vandebendy*, where it was held that ſuch a term ſhould protect the eſtate from dower in the hands of a purchaſer

It was decreed, that the plaintiff ſhould be let into her dower, keeping down the intereſt of a third part of the mortgage.

A Term only protects a Purchaſer where it is aſſigned to a Truſtee for him.

§ 29. A truſt term ſtanding out in a truſtee to attend the inheritance, will not proteſt a purchaſer from the claim of dower, where it has not been aſſigned to a truſtee for ſuch purchaſer.

Maundrell v. Maundrell.

§ 30. In a caſe which aroſe laſt year, the queſtion was, whether a purchaſer could proteſt himſelf againſt a claim of dower, by a term attendant upon the inheritance, of which he had not procured an aſſignment to a truſtee for himſelf.

Sir *William Grant* M. R., ſtated his opinion to be, that, without an aſſignment to a truſtee for the purchaſer, the term did not exclude the claim of dower. He obſerved that, at law, all terms were conſidered as terms in groſs, and, therefore, every exiſting term, without regard to the purpoſe for which it was created, prevented a dowreſs from having any legal benefit from her recovery in dower; for ſhe recovered with ſtay of execution during the term: but equity regarded the purpoſe for which the term was created and ſubſiſted; and if it was only for the benefit of the owner of the inheritance, it was conſidered as part of the inheritance, not indeed abſolutely merged, but ſo attendant upon, as to follow and accompany it, and every right and intereſt growing out of it, either by operation of law, or by voluntary agreement of parties. Equity ought not,

not, therefore, to permit ſuch a term to be in any caſe uſed againſt the owner of the inheritance, either of the whole, or a part of the inheritance; for the uſes adapted and accommodated themſelves to all the intereſts which aroſe out of that inheritance, with which, in contemplation of equity, the term, for moſt purpoſes, was conſidered incorporated. Every deſcription, therefore, of ownerſhip, ſhould, in its order, deſign, and proportion, have a uſe in the term, commenſurable with the intereſt exiſting in the inheritance. Therefore, when dower aroſe, the term, in a proportion, was juſt as much attendant upon the intereſt growing out of the inheritance, as before it was attendant upon the inheritance during the huſband's life. The heir, therefore, though he could avail himſelf of the term at law, was not allowed in that court to defeat the widow's claim to dower; for, having a certain quantity of intereſt, equity muſt conſider her as having correſpondent intereſts in the term. When the huſband conveyed to a purchaſer, and the wife did not by fine join, nothing paſſed but the eſtate the huſband had, that is, an eſtate ſubject to dower. The right to dower remained juſt where it was. The purchaſer ſtood preciſely in the place of the huſband. The outſtanding term would accompany the inheritance thus conveyed, in the mode and manner in which it was attendant upon the ſame inheritance, before it was conveyed. The term being a mere acceſſory, the operation of the conveyance was purely derivative and conſequential. It was not poſſible that a greater intereſt could be incidentally acquired under the term, than directly in the freehold.

That the whole doctrine upon this ſubject was diſcuſſed by Lord *Hardwicke* in *Willoughby* v. *Willoughby*, where his Lordſhip noticed the opinion of ſome conveyancers, that where there was a term of which the truſt was already declared to attend the inheritance, it was not neceſſary to diſturb it, and take an aſſignment to new truſtees; and ſhewed that not to be generally true. But if there were antecedent incumbrances, nothing but an aſſignment could protect againſt them; and he conceived dower to be ſuch an intereſt as could be guarded againſt only by an aſſignment,

Tit. 15. ch. 5.

His Honour concluded, as to this point, by ſaying, that, from the whole tenor of the judgment in *Swannock* v. *Lifford*, it appeared, that the term did not exclude dower: and decreed that the widow was entitled to dower (*a*).

Ante, f. 24.

Curteſy not barred by a Term.

§ 31. It has, however, been determined, that a tenant by the curteſy ſhall have the aid of equity, againſt a truſt term, aſſigned in truſt to attend the inheritance, and ſet up againſt him by the heir at law.

Snell v. Clay, 2 Vern. 324.

Where an outſtanding Term is a Bar in Ejectment.

§ 32. In conſequence of the doctrine ſtated in ch. 2. § 32. it was formerly held, that if a defendant in ejectment could ſhew that there was an outſtanding term for years veſted in a third perſon, to the poſſeſſion of which the plaintiff was not entitled, ſuch plaintiff could not recover.

(*a*) I am indebted to the politeneſs of Mr. *Veſey* for the peruſal of his note of this caſe, from which the above abſtract has been taken.

In

In the ſame manner, where a defendant could ſhew that there was an outſtanding term, of which the truſts were not completely ſatisfied, this would alſo operate as a bar to the plaintiff.

§ 33. But in a modern caſe, it was determined by Lord *Mansfield*, that, although there was an unſatisfied outſtanding term, yet, if the plaintiff admitted the charge for which the term was created, and claimed ſubject to the charge, the truſtees not aſſerting their title, he ſhould recover.

Doe ex Dem. Briſtowe, v. Pegg, 1 Term R. 758. n.

§ 34. This doctrine has, however, been altered by a ſubſequent determination, in which it was reſolved, that a ſatisfied term may be preſumed to be ſurrendered; but that an unſatisfied term, raiſed for the purpoſe of ſecuring an annuity, may be ſet up, during the life of the annuitant, as a bar to a plaintiff in ejectment, even though he claims ſubject to the charge.

Doe ex Dem. Hodſden v. Staple, 2 Term R. 684.

§ 35. In another modern caſe, Lord *Kenyon* directed a jury to preſume that an old ſatisfied term was ſurrendered to the *ceſtuique* uſe. Saying, that he had grounded himſelf upon the doctrine laid down by Lord *Mansfield* in the caſe of *Lade* v. *Holford*, which was not, as had been ſuppoſed, that an ejectment might be maintained upon a mere equitable title, which would remove antient land marks in the law, and create great confuſion; but that, in all caſes where truſtees ought to convey to the beneficial owner, he would leave it to the jury to preſume, where ſuch preſumption might be reaſonably made, that they had conveyed accordingly,

Doe v. Sybourn, 7 Term Rep. 2.

Buller's N. P. 110.

ingly, in order to prevent a juſt title from being defeated by a matter of form.

Goodtitle v. Jones, 7 Term R. 47.

§ 36. But, in a ſubſequent caſe, it was ſaid, that although, under certain circumſtances, a jury may preſume a ſatisfied term to have been ſurrendered to the *ceſtuique* uſe, yet, if no ſuch preſumption be made, and it appears in a ſpecial verdict in ejectment that ſuch a term is ſtill outſtanding in a truſtee, who is not joined in bringing the ejectment, the *ceſtuique* uſe cannot recover.

TITLE XII.

TRUST.

CHAP. IV.

Of the Eſtate and Duty of Truſtees.

§ 1. *Eſtate of Truſtees.*
6. *No Act of a Truſtee ſhall prejudice the Truſt.*
8. *Exceptions.*
9. *Conveyance without Notice.*
11. *Where Purchaſers from Truſtees are liable to the Truſts.*
31. *Attainder of the Truſtee.*
32. *Death of the Truſtee without Heirs.*
33. *Truſtees have equal Power.*
34. *Not to derive any Benefit from the Truſt.*
35. *Where a Truſtee may purchaſe the Truſt Eſtate.*
43. *Bound to reimburſe the Ceſtuique Truſt.*
47. *Not allowed for Trouble.*
49. *But allowed for Coſts.*
52. *Where a Truſtee refuſes to accept a Truſt he muſt releaſe.*
53. *Truſtees diſcharged and others appointed by the Court of Chancery.*

Section 1.

Eſtate of Truſtees.

A TRUST eſtate being now conſidered, in ſome reſpects, as ſimilar to what a uſe was before the ſtatute 27 *Hen.* 8., it follows that truſtees are now in the ſame ſituation as feoffees formerly were. And, therefore, it is ſtill held, in conformity to the antient doctrine of uſes, that pernancy of the profits, execution of eſtates, and defence of the land, are the three great properties of a truſt. So that the Court of Chancery will compel truſtees, 1ſt, To permit the *ceſtuique* truſt to receive the rents and profits of the land. 2dly, To execute ſuch conveyances as the *ceſtuique* truſt ſhall direct.

direct. And, 3dly, To defend the title in a court of law or equity.

§ 2. The neceſſity that the truſtee ſhould execute conveyances of the land ariſes from this circumſtance; that as the legal eſtate is veſted in the truſtee, who is conſidered, in a court of law, as the real owner of the land, it follows that, although the *ceſtuique* truſt can alone diſpoſe of his equitable intereſt, yet he cannot convey the legal eſtate in the land, without the aſſiſtance of the truſtee; and, therefore, where the *ceſtuique* truſt has the abſolute intereſt in fee-ſimple in the truſt, he can compel the truſtee to convey the legal eſtate, either to himſelf or to any other perſon.

2 P. Wms. 134.

§ 3. The *ceſtuique* truſt is only entitled to a conveyance where the whole of the truſt belongs to him. But if lands are deviſed to truſtees, in truſt to pay annuities, and ſubject thereto in truſt for *A. B.*, the legal eſtate cannot be taken from the truſtees, while the annuities are ſubſiſting.

1 Ab. Eq. 384. 2 P. Wms. 134. Boteler v. Allington, 1 Bro. Rep. 72.

§ 4. Where there is a *ceſtuique* truſt in tail, he may call on the truſtee to convey the legal eſtate to him; and no one can afterwards prevent him from levying a fine or ſuffering a recovery.

Vide Tit. 32.

§ 5. Infant truſtees are enabled, by a modern act of parliament, to convey lands whereof they are ſeiſed in truſt under the direction of the Court of Chancery.

§ 6. It

§ 6. It is a rule in equity, that no act of a truſtee ſhall prejudice the *ceſtuique* truſt. And, therefore, if a truſtee conveys away the truſt eſtate, for a full conſideration, to a perſon who has notice of the truſt, the purchaſer will be conſidered in equity as a truſtee for the *ceſtuique* truſt. Nor ſhall the forbearance of truſtees, in not doing what it was their office to have done, prejudice the *ceſtuique* truſts; ſince, at that rate, it would be in the power of truſtees, either by doing or delaying to do their duty, to affect the rights of other perſons. Wherefore the rule in all ſuch caſes is, that what ought to have been done, ſhall be taken as done; and a rule ſo powerful it is, as to alter the very nature of things—to make money land, and, on the contrary, to turn land into money.

No Act of a Truſtee ſhall prejudice the Truſt.

Ante, ch. 1. f. 62.

3 P. Wms. 215.

Banks v. Sutton, 2 P. Wms. 706.

Allen v. Sayer, Tit. 35. ch. 14.

§ 7. One of the principal inconveniencies of uſes was, that the eſtate of feoffees to uſes became ſubject to all their legal incumbrances. But, upon the eſtabliſhment of truſts, it was ſettled, that a truſt eſtate ſhall not be ſubject to the debts or other incumbrances of the truſtee, to the dower of the truſtee's wife, or to the curteſy of the truſtee's huſband.

1 P. Wms. 278.
2 —— 318.
Noell v. Jevon, 2 Freem. R. 43.

§ 8. There are, however, ſome exceptions to the rule, that a truſtee cannot, by any act of his, prejudice the intereſt of the *ceſtuique* truſt, in the eſtate.

Exceptions.

§ 9. Thus, if the truſtee be in the actual poſſeſſion of the eſtate, (which ſcarce ever happens), and conveys it for a valuable conſideration to a purchaſer, who has no notice of the truſt, ſuch purchaſer will be entitled to hold

Conveyance without Notice.

Pye v. Gorge, 1 P. Wms. 128.

hold the eſtate againſt the *ceſtuique* truſt; becauſe it is a rule in equity, that an innocent purchaſer ſhall in no caſe have his title impeached. But the truſtee will be compelled, in equity, to make a full compenſation to the *ceſtuique* truſt.

1 P. Wms. 278.

§ 10. If a truſtee mortgages the eſtate to a perſon who has no notice of the truſt, ſuch mortgagee will be allowed to hold againſt the *ceſtuique* truſt; becauſe mortgagees are conſidered as having a ſpecific lien on the eſtate: whereas, it has been obſerved, that eſtates held in truſt, are not ſubject to the judgment or ſpecialty debts of the truſtee, becauſe creditors of this latter kind have only a general lien.

Where Purchaſers from Truſtees are liable to the Truſts.

§ 11. We have ſeen, that a purchaſe from a truſtee, with notice of the truſt, is a fraud, even though the purchaſer ſhould pay a valuable conſideration. But where a truſtee is authorized to ſell, ſuch a purchaſe is not fraudulent. There are, however, many caſes, in which a purchaſer, with notice of a truſt eſtate, is anſwerable for a truſtee, and, therefore, bound to ſee that his money is applied in execution of the truſt.

Dunch v. Kent, 1 Vern. 260. Spalding v. Shalmor, 1 Vern. 301.

§ 12. Thus, where a perſon conveys or deviſes his eſtate to truſtees, upon truſt to ſell, for payment of certain debts ſpecified in the deed or will, or in any ſchedule annexed thereto, a purchaſer is bound to ſee that his money is applied in payment of thoſe debts.

§ 13. Where

§ 13. Where a decree was made, and directions for a ſale or mortgage, and that the money ſhould be applied in payment of debts, which were aſcertained by a report of the Maſter, Lord *Hardwicke* decreed, that a purchaſer under that decree was bound to ſee to the application of his money. Lloyd v. Baldwin, 1 Veſ. 173.

§ 14. On the other hand, it has long been fully eſtabliſhed, that where lands are directed to be ſold for payment of debts generally, without any ſpecification of ſuch debts, a purchaſer is not bound to ſee to the application of his purchaſe money. 1 Veſ. 173. Smith v. Guyon, 1 Bro. R. 186. Williamſon v. Curtis, 3 Bro. R. 96.

§ 15. Legacies ſtand upon the ſame ground as ſpecified or ſcheduled debts; and therefore a purchaſer ſhould ſee that his money is applied in payment of them. But where a truſt is created for payment of debts and legacies, a purchaſer is not bound to ſee that his money is applied in payment of the legacies.

§ 16. Thus, where a perſon deviſed his real eſtates to truſtees to ſell and pay his own and his father's debts and legacies, Lord *Hardwicke* ſaid,—"The ſubjecting "the eſtate to the payment of legacies, will not make "the purchaſer anſwerable for the diſpoſition of the "money, becauſe the legacies cannot be paid without "the debts, and they are not ſpecified." Rogers v. Skillicorne, Amb. 188.

§ 17. In the caſe of *Jebb* v. *Abbett*, Lord *Thurlow* is reported to have ſaid,—"Where debts and legacies "are charged on lands, the purchaſer will hold free 1 Bro. Rep. 186. n. 2d Edit.

" from the claim of the legatees; for, not being bound " to ſee the diſcharge of debts, he cannot be expected " to ſee the diſcharge of legacies, which cannot be paid " till after the debts."

Id. And in the caſe of *Beyon* v. *Gollins*, the bill was diſmiſſed as to the purchaſers, with coſts, they not being bound under the charge, to ſee to the application of the purchaſe money.

Culpeper v. Aſton, 2 Cha. Ca. 115. § 18. Where a perſon deviſed his real eſtate to his executors, to be ſold for payment of debts, in caſe his perſonal eſtate ſhould be deficient, it was held, that a purchaſer was not bound to inquire whether there was a deficiency of the perſonal eſtate or not, for, if the perſonal eſtate was ſufficient, yet he ſhould hold the lands purchaſed againſt the heir; and the heir ſhould have his remedy againſt the executor. But if there be a *lis pendens* between the heir and executor, to have an account, it is ſufficient notice in law, without actual notice of the ſuit, ſo that a purchaſer takes at his peril.

§ 19. Where a perſon charges a chattel real with the payment of a particular debt, or bequeaths it ſpecifically, this will not ſubject a purchaſer of ſuch chattel to ſee to the application of his purchaſe.

Ewer v. Corbet, 2 P. Wm. 148. § 20. One poſſeſſed of a term for years, deviſed it to *A.*, and died indebted, having made *B.* executor. *B.* ſold the term, upon which *A.* brought a bill againſt

the purchaſer, inſiſting, that the term being deviſed to him, the executor was but a truſtee for him; and, that the purchaſer muſt have notice of this truſt, and conſequently muſt take ſubject to the truſt.

Sir *J. Jekyll*, M. R.—" I remember it to have been " once ruled, that an executor could not make a good " title to a term to a purchaſer; and that was in the " caſe of Major *Bill* v. *Humble*. But, ſince that, I " take it to have been reſolved, and with great reaſon, " that an executor, where there are debts, may ſell a " term; and the deviſee of the term has no other re- " medy, but againſt the executor, to recover the " value thereof, if there be ſufficient aſſets for the " payment of debts. As for the notice of the will, " and of the deviſe of the term to a third perſon, that " is nothing, for every perſon buying of an executor, " where he is named executor, muſt, of neceſſity, " have notice; ſo that, if notice muſt be an hin- " drance, then, of conſequence, no executor might " ſell.

2 Vern. 444. Bro. Parl Ca. vol. 3. p. 5. Savage v. Humble, S. C.

" It is not reaſonable, to put every purchaſer of a " leaſe from an executor to take an account of the " teſtator's debts; nor has he any means to diſcover " them.

" On the contrary, as the whole perſonal eſtate of " the teſtator is liable to the debts, this leaſe muſt, " *inter alia*, of neceſſity be liable, and therefore, " may be ſold by the executor. If equity were " otherwiſe, it would be a great hindrance to the pay-

" ment of debts and legacies; and would lay an " embargo upon all perſonal eſtates in the hands of " executors and adminiſtrators, which would be at- " tended with great inconveniencies."

The bill was diſmiſſed.

Nugent v. Gifford, 1 Atk. 463.

§ 21. Even an aſſignment of a term for years, by an executor, as a ſatisfaction for a debt due to the aſſignee of the term from the executor himſelf, is good againſt the creditors of the teſtator: for, (ſays Lord *Hardwicke*), " at law, the executor has a power to " alien the aſſets of his teſtator; and when they are " aliened, no creditor can follow them, for the de- " mand of a creditor is only a perſonal demand againſt " the executor, in reſpect to the aſſets come to his " hands, but no lien on the aſſets. The Court of " Chancery will indeed follow aſſets upon voluntary " alienation, by colluſion of the executor: but, if the " alienation is for valuable conſideration, unleſs fraud " is proved, the Court of Chancery ſuffers it as well " as at law, and will not controul it; for a purchaſer " from an executor has no power of knowing the " debts of the teſtator: and if the Court of Chancery, " upon the appearance of debts afterwards, would " controul ſuch purchaſers, nobody would venture to " deal with executors."

Ante.

§ 22. It is ſaid by the Maſter of the Rolls in the caſe of *Ewer* v. *Corbet*, that if an executor ſhould ſell a term to one who has notice that there are no debts, or that all the debts are paid, this might be another conſidera- tion;

tion; that is, the purchaſer would be anſwerable for his purchaſe or mortgage money.

§ 23. It is ſaid in *Elliot* v. *Merryman*, *Barn.* 78., that where lands are charged with the payment of annuities, thoſe lands will be liable in the hands of a purchaſer: becauſe it was the very purpoſe of making the lands a fund for that payment, that it ſhould be a conſtant and ſubſiſting fund. Wynn v. Williams, 5 Veſ. jun. 130.

§ 24. It has been long ſettled, that where lands are conveyed to truſtees in truſt to ſell and pay debts, if more is ſold than is ſufficient to pay the debts, that ſhall not turn to the prejudice of the purchaſer, for he is not obliged to enter into the account, and the truſtee cannot ſell juſt ſo much as is ſufficient to pay the debts. 1 Vern. 303.

§ 25. In a caſe where lands were by will directed to be ſold for payment of debts, and a decree made in Chancery, that the eſtate ſhould be ſold for payment of debts, a purchaſer under the decree excepted to complete his purchaſe, becauſe more of the eſtate was ſold than was neceſſary. Lutwych v. Winford, 2 Bro. R. 248.

Lord *Thurlow* ſaid,—"If the maſter, in ſelling the "whole, has conſulted the convenience of the eſtate, "he has acted right; the power given to the truſtees "was, to ſell the whole, or ſuch part as might be "expedient. The court has decreed in the ſame way, "and the maſter, with the conſent of the parties in-

" tereſted, has ſold the whole, a purchaſer cannot " come in to object to it." The exception was overruled.

§ 26. Where eſtates are conveyed or deviſed to truſtees, upon truſt to ſell and apply the money for any particular or ſpecific purpoſe, a purchaſer of the eſtate, with notice of the truſt, is bound to ſee to the application of the money, for the purpoſes mentioned in the deed or will; for if thoſe purpoſes are not fulfilled by the truſtee, the eſtate purchaſed will ſtill be liable to them, in the hands of the purchaſer.

Cottrell v. Hampſon, 2 Vern. 5.

§ 27. Thus, where lands were veſted in truſtees by act of parliament, to be mortgaged for the raiſing a ſum of money to rebuild a printing-houſe, it was decreed, that the mortgagee was bound to ſee the money applied accordingly.

4 Veſ. jun. 99.

§ 28. Lord *Kenyon*, when maſter of the rolls, inclined ſtrongly to the opinion, that where truſtees have power to ſell, they muſt have the power incident to the character, *viz.* the power to give a diſcharge for the purchaſe money: but this point was not decided.

§ 29. It is the uſual practice to inſert a clauſe in all deeds by which truſtees are directed to ſell lands, declaring that their receipts ſhall be a ſufficient diſcharge to the purchaſers, who ſhall not be anſwerable or accountable for the miſapplication or nonapplication of the purchaſe money. And it is fully eſtabliſhed, that

that where a clauſe of this kind is inſerted in a deed or will, by which truſts are created, truſtees may make a good title to a purchaſer. But, in a caſe of this kind, *all* the truſtees who accept the truſt, muſt join in the receipt.

§ 30. Mrs. *Crewe* conveyed real eſtates to the uſe of herſelf for life, remainder to three perſons, their heirs and aſſigns, in truſt to ſell, with a proviſo, that the receipts of thoſe three perſons ſhould be a ſufficient diſcharge to the purchaſers, who ſhould not be anſwerable for the application of the purchaſe money. One of the truſtees died, another being unwilling to act in the truſt, conveyed the premiſes to the remaining truſtee, who ſold them. The purchaſer refuſed to take the conveyance, unleſs the truſtee who had conveyed his intereſt would join in the receipt for the purchaſe money, which he declined. Crewe v. Dicken, 4 Veſ. jun. 97.

A bill was filed to compel a ſpecific performance of the agreement. The defendant ſubmitted, that the receipt for the purchaſe money ought to be ſigned by both the ſurviving truſtees.

Lord *Loughborough*.—" I do not feel it is poſſible to " help the plaintiff. If he had renounced, as in that " caſe that has been put, (*Smith* v. *Wheeler*, 1 *Vent.* " 130.), he might diſſent, when no eſtate paſſes. The " whole eſtate would have been in the plaintiff, exactly " as if the two other truſtees had died in the life of " the teſtator, he would have been the only perſon; Infra

" but, according to the way they have managed it, " he has accepted the truſt, and conveyed away the " eſtate; that part of the truſt that conſiſts in the ap- " plication of the money, he could not convey away. " The hazard, probably, is not great; but I do not " know how to make the purchaſer run the hazard. " Taking the title with the knowledge of the truſt, he " would be bound to ſee the application of the money. " I do not feel that I can make the purchaſer paſs over " this objection."

Attainder of Truſtee.

Treat. of Eq. b. 2. c. 7. ſ. 1.

§ 31. Where a truſtee is attainted of treaſon or felony, the legal eſtate becomes forfeited to the crown: and it having been formerly eſtabliſhed, that the king could not be ſeiſed to a uſe, it was held in analogy to that principle, that the king is not bound to execute a truſt in equity; and, therefore, in a caſe of this kind, the *ceſtuique* truſt muſt looſe his eſtate.

Death of the Truſtee without Heirs.

§ 32. Where a truſtee dies without heirs, by which the lands eſcheat either to the king, or *to the lord of whom* the lands are held, the *ceſtuique* truſt cannot compel the lord to execute the truſt. The king is authorized by the ſtatute 39 and 40 *Geo.* 3. c. 88. ſ. 12., to execute a truſt where the legal eſtate becomes veſted in the crown, by the death of the truſtee without heirs. But there is nothing in the act to oblige the crown to execute the truſt.

Truſtees have equal Power, &c.

§ 33. Truſtees have all equal power, intereſt, and authority, and cannot act ſeparately, but muſt all join, both

both in conveyances and receipts. It ſhould, however, be obſerved, that although two truſtees join in a receipt, where the money is in fact paid to one of them, yet the truſtee who actually received the money will only, in general, be accountable. And in all deeds by which truſts are created, a clauſe is inſerted, that each truſtee ſhall only be accountable for ſuch ſums of money as ſhall actually come to his hands. And it has been determined in a modern caſe, that this does not bind the truſtees as a covenant, but is a clauſe of indemnity, and the ſenſe of it is this, that the truſtees, and their heirs, ſhall not be accountable for more than they receive. They are accountable for what they actually receive, but not as under a covenant.

Vide 1 P. Wms. 82. n. 3 Bro. Rep. 90.

Bartlett v. Hodgſon, 1 Term. R. 42.

§ 34. The Court of Chancery will not, in any caſe, permit a truſtee to derive a benefit from his truſt; and, therefore, if a truſtee compounds a debt, or buys it for leſs than is due on it, he ſhall not derive any advantage to himſelf from ſuch a tranſaction. But where a truſtee releaſes or compounds a debt, if it appears to have been done for the benefit of the truſt eſtate, the truſtee will be excuſed.

Not to derive any Benefit from a Truſt.

3 P. Wms. 251. n. Forbes v. Roſs, 1 Bro. Rep. 130.

§ 35. It was formerly held, that the Court of Chancery would not permit a truſtee to purchaſe any part of a truſt eſtate for himſelf, on account of the dangerous conſequences that might enſue from ſuch a practice.

Where a Truſtee may purchaſe the Truſt Eſtate.

§ 36. It was declared by Lord *Hardwicke*, that the court will not ſuffer a truſtee to purchaſe the eſtate of the

Daviſon v. Gardner, Forreſt. MS. Rep. 1743.

the *ceſtuique* truſt during his minority, though the tranſaction be fair and honeſt, and as high or higher a price given than any other perſon would give. But this the court has always diſcountenanced, upon account of the general inconvenience that might happen from bargains of this kind. But where there is a decree for ſale of the *ceſtuique* truſt's eſtate, and an open bidding before the maſter, there the court has permitted the truſtee to purchaſe, for that is an open auction of the eſtate. But, at the ſame time, his lordſhip declared the rule of the court againſt truſtees purchaſing, did not extend to truſts for perſons of full age.

Whelpdale v. Cookſon, 1 Veſ. 9.

§ 37. On deviſe for payment of debts, the truſtee himſelf purchaſed part: Lord *Hardwicke* ſaid he would not allow it to ſtand good, although another perſon, being the beſt bidder, bought it for him at a public ſale, for he knew the dangerous conſequence: nor is it enough for the truſtee to ſay you cannot prove any fraud, as it is in his own power to conceal it; but if the majority of the creditors agreed to allow it, he ſhould not be afraid of making the precedent.

Killick v. Flexney, 4 Bro. R. 161.

§ 38. A truſtee, who had acted improperly in other reſpects, bought a leaſe, which was part of the truſt property, at an appraiſement, and afterwards renewed it in his own name, and bought part of the ſtock. Decreed, that he ſhould be a truſtee only, and account for what he purchaſed.

§ 39. In a ſubſequent caſe it was held, that there is no general rule that a truſtee to ſell ſhall not be himſelf

ſelf the purchaſer; but he ſhall not thereby acquire a profit.

§ 40. An eſtate was conveyed to ſix perſons, in truſt to ſell for the benefit of creditors. The eſtate was put up to auction, and purchaſed by one of the truſtees, who afterwards ſold it at a profit. Upon a bill filed by ſome of the creditors, praying that this purchaſe by the truſtee might be for the benefit of the creditors, Lord *Loughborough* ſaid, it was a plain point of equity, and a principle of clear reaſoning, that he who undertakes to act for another in any matter, ſhall not, in the ſame matter, act for himſelf; therefore a truſtee to ſell ſhall not gain any advantage by being himſelf the perſon to buy: he is not acting with that want of intereſt, that total abſence of temptation, that duty impoſed upon him, that he ſhall gain no profit. The conſequence is beyond doubt that, in whatever ſhape that profit redounds to him, whether by management, which is the common caſe, or by ſuperior good fortune, it is not fit that benefit ſhall remain to him: it ought to be communicated to thoſe whoſe intereſts, being put under his care, afforded him the means of gaining that advantage. Whichcote v. Lawrence, 3 Veſ. jun. 740.

The truſtee was decreed to account for the profits with coſts.

§ 41. In the laſt caſe which aroſe on this point it was determined, that where a truſtee purchaſes the truſt eſtate, however fair the tranſaction, it muſt be ſubject

ject to an option in the *ceſtuique* truſt, if he comes in a reaſonable time to have a re-ſale.

Campbell v. Walker, 5 Veſ. jun. 678.

§ 42. A perſon deviſed his eſtates to two truſtees, upon truſt to ſell. One of the truſtees purchaſed part of the eſtates at auction. A bill was filed by the reſiduary legatees, praying that the ſales might be ſet aſide, and the premiſes re-ſold. It appeared, upon the evidence, that the ſales were perfectly fair and open. The Maſter of the Rolls ſaid, he would lay it down as a rule, that any truſtee, purchaſing the truſt property, is liable to have the purchaſe ſet aſide, if, in any reaſonable time, the *ceſtuique* truſt chooſes to ſay he is not ſatisfied with it: the truſtee purchaſes ſubject to that equity.

It was referred to a maſter to enquire whether it was for the benefit of the plaintiffs that the premiſes ſhould be re-ſold; and if the maſter ſhould be of opinion that it would be for their benefit, then it was declared that they ſhould be re-ſold.

Bound to reimburſe the Ceſtuique Truſt.

Boardman v. Moſſman, 1 Bro. R. 68.

§ 43. Whenever truſtees are guilty of a breach of truſt, the Court of Chancery will compel them to reimburſe the *ceſtuique* truſt for any loſs which he may have ſuſtained. And if a truſtee conceals any act done by his co-truſtee, which amounts to a breach of truſt, he will thereby make himſelf equally liable.

1 Ab. Eq. 384. n.

§ 44. Lord *Hobart* is reported to have been of opinion, that an action at law might be maintained againſt a truſtee

truſtee for a breach of truſt. But this opinion is inconſiſtent with Lord *Hardwicke*'s definition of a truſt, which is, that it is ſuch a confidence between parties, that no action at law will lie; but that it is merely a caſe for the conſideration of a court of equity. Sturt v. Melliſh, 2 Atk. 612.

It is, however, obſervable, that even in equity the *ceſtuique* truſt is conſidered but as a ſimple contract creditor, in reſpect of ſuch breach of truſt; unleſs the truſtee has acknowledged the debt to the truſt eſtate under hand and ſeal. 2 Atk. 119. Forreſt. 109.

§ 45. And although a truſtee for the purchaſer of land, ſhould buy land, it will not be liable to the truſt, unleſs there are circumſtances affording a preſumption, that it was purchaſed with the truſt money.

§ 46. *Thomas Lockyer*, being a deviſee of conſiderable eſtates, in truſt to lay out the produce thereof in the purchaſe of lands, did purchaſe ſeveral eſtates, but died without perſonal aſſets. Perry v. Philips, 4 Veſ. junr 108.

A bill was filed by the *ceſtuique* truſt, praying that the deficiency of the perſonal eſtate of *Thomas Lockyer* ſhould be made good out of the real eſtates which he had purchaſed. There was no evidence that the lands were purchaſed with the truſt money.

It was contended on the behalf of the plaintiffs, that where a man is bound to do an act, and does what may enable him to do it, he ſhall be taken to do that in

in performance of what he is bound to do, and that between repreſentatives.

The court held, that the plaintiffs had no lien on the eſtates purchaſed by *Thomas Lockyer*, being creditors by ſimple contract only. If there had been any ground to preſume that the purchaſes had been made with the truſt money, it would have been otherwiſe.

Not allowed for Trouble.

Treat. of Eq. b. 2. c. 7. ſ. 3.

§ 47. It is an eſtabliſhed rule, that a truſtee ſhall have no allowance for his care and trouble; for, on pretences of this kind, the truſt eſtate might be impoveriſhed. Beſides the great difficulty there might be in adjuſting the *quantum* of ſuch allowances; eſpecially as one man's time may be more valuable than another's: and there can be no hardſhip in this, reſpecting any truſtee, who may chooſe whether he will accept the truſt or not.

Elliſon v. Airey, 1 Veſ. 112.

§ 48. But in a caſe where there was a direction in a will that the truſtees ſhould be paid for their trouble as well as expence; and it was objected that this might be of general prejudice. Lord *Hardwicke* ſaid this was a legacy to the truſtees, to whom the teſtator may give ſatisfaction if he pleaſes. And in Serjeant *Hall*'s will, Sir *Richard Hopkins*', and in the caſe of the Ducheſs of *Marlborough*, there was a great allowance made for their trouble; and no inconvenience, becauſe it can carry it no farther than where there are particular directions. The maſter was therefore directed to enquire what the truſtees might reaſonably deſerve for their trouble.

§ 49. A truſtee will, however, be allowed all coſts and expences which he has been put to in the execution of his truſt, unleſs he has been guilty of improper conduct.

But allowed for Coſts.

Treat. of Eq. b. 2. c. 7. ſ. 3.

§ 50. Thus, if a truſtee ſues in Chancery for the truſt eſtate, and obtains a decree with coſts, and, afterwards, the *ceſtuique* truſt exhibits a bill for an account of the truſt eſtate, the truſtee will be allowed, in his diſburſements, his full coſts, and will not be concluded by the coſts that were taxed.

Amand v. Bradburn, 2 Cha. Ca. 138.

Trott v. Dawſon, 1 P. Wms. 780.

§ 51. It is alſo a rule, that the *ceſtuique* truſt ought to ſave the truſtee harmleſs as to all damages relating to the truſt.

2 P. Wms. 455.

§ 52. Where a truſtee refuſes to accept a truſt, the uſual practice is, to procure him to releaſe all his eſtate and intereſt to the other truſtees. For although a perſon to whom an eſtate of freehold is limited may diſclaim it in a court of record, and if it is only a chattel, may diſclaim it *in pais*, yet it is found more convenient, that a truſtee ſhould releaſe his intereſt..

Where a Truſtee refuſes to accept a Truſt he muſt releaſe.

3 Rep. 26 *b.* Smith v. Wheeler, 1 Vent. 130. Vide Tit. 32.

§ 53. We have ſeen, that the Court of Chancery will not ſuffer a truſt to fail for want of a proper truſtee; and, therefore, if a truſtee refuſes to accept a truſt, the court will interpoſe, and either appoint a new truſtee, or take upon itſelf the execution of the truſt.

Truſtees diſcharged and others appointed by the Court of Chancery.

Ch. 1. ſ. 69.

§ 54. A per-

Travel v. Danvers, Rep. Temp. Finch. 380.

§ 54. A perſon, by will, gave all his lands of inheritance to two truſtees, upon truſt to ſell, and pay his debts, One of the truſtees deſired to relinquiſh the truſt, and the other was willing to accept it. Decreed, that the truſtee who deſired to relinquiſh, ſhould releaſe to the other.

Uvedale v. Ettrick, 2 Cha. Ca. 20.

§ 55. In a ſubſequent caſe, the Court of Chancery removed a truſtee, though he was willing to act, the other truſtees having refuſed to join with him in the execution of the truſt.

Lake v. De Lambert, 4 Veſ. jun. 592.

§ 56. In a modern caſe, a decree was made, that a woman who was a truſtee, but who had married a foreigner, ſhould be diſcharged from the truſt, though ſhe denied an intention of quitting the kingdom, and deſired to continue in the truſt; but the court ſaid, that there was a great inconvenience in a married woman's being a truſtee.

§ 57. In all modern deeds of truſt, there is a proviſo, that in caſe of any truſtee dying, or being deſirous of relinquiſhing the truſt, a new truſtee ſhall be appointed, either by the *ceſtuique* truſt, or the old truſtees; and the property ſhall be conveyed to ſuch new truſtee jointly with the remaining truſtees. But where this clauſe is omitted, the Court of Chancery will appoint a new truſtee.

Buchanan v. Hamilton, 5 Veſ. jun. 722.

§ 58. By a private act of parliament, eſtates were veſted in three truſtees, upon truſt to ſell, *&c.*; but there

there was no proviſion made for the change of truſtees. Mr. *Scott*, one of the truſtees, being appointed Attorney General of *Upper Canada*, executed a releaſe: a bill was filed againſt the two remaining truſtees, praying a reference to the maſter to appoint a new truſtee. It was ſaid to be a common caſe, and the court referred it to a maſter to appoint a new truſtee.

END OF THE FIRST VOLUME.

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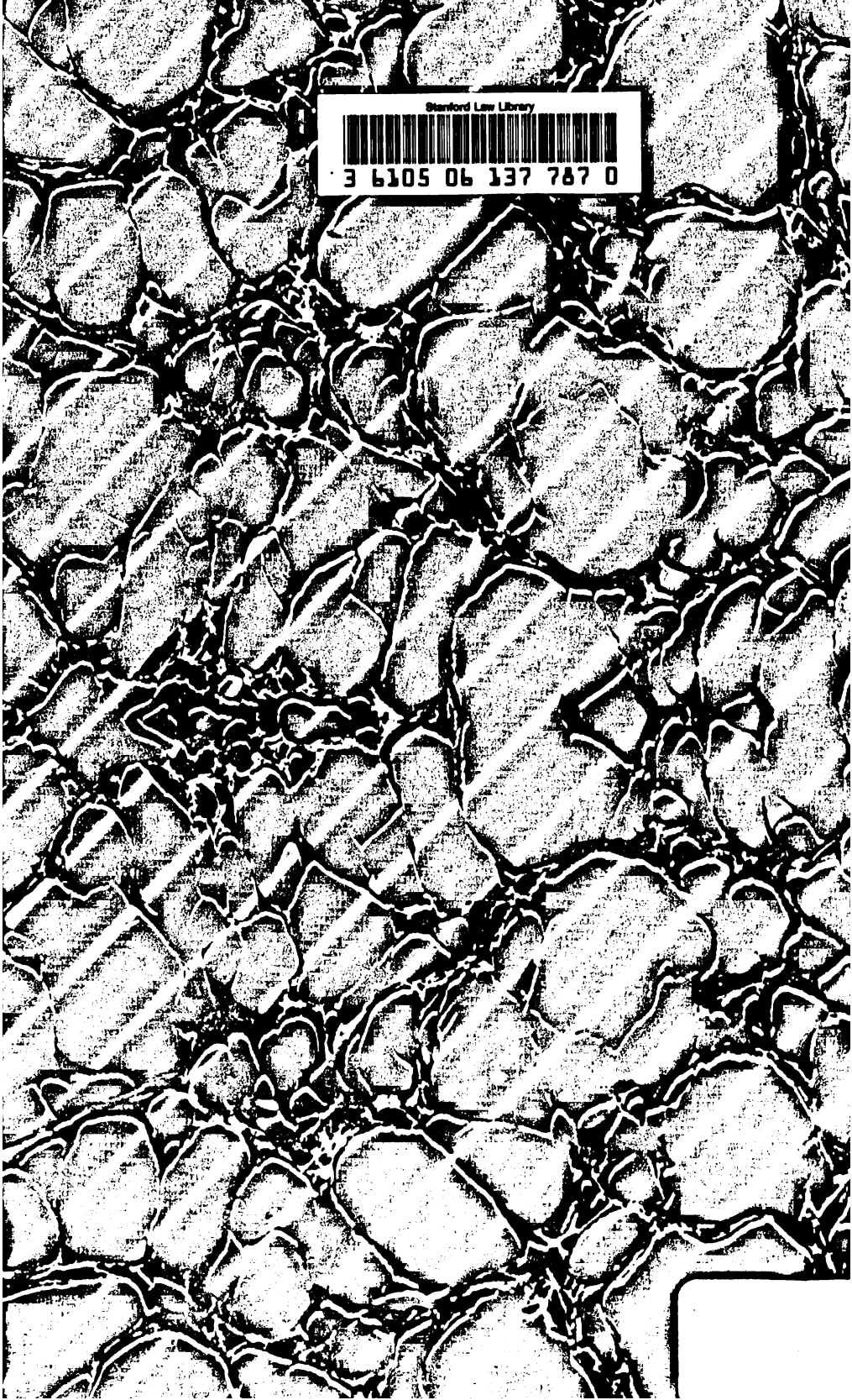
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